80-812

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

FETTINGER AND BLOOM

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MESCALERO APACHE TRIBE,

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FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

The Mescalero Apache Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 5, 1980.

QUESTION PRESENTED

Whether *White Mountain Apache Tribe v. Bracker*, _____U.S._____, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980) and *Central Machinery Company v. Arizona State Tax Commission* _____U.S._____ 65 L.Ed.2d 684, 100 S.Ct. 2592 (1980) require reversal of that portion of the Tenth Circuit opinion upholding New Mexico's authority to tax gross receipts derived from construction contracts between the Mescalero Apache Tribe and Non-Indian contractors who

possess federal traders licenses, where the construction projects were constructed within the boundaries of the Mescalero Apache Reservation for the tribe or its agent; where the purpose of these projects was the social and economic development of the tribe and its members; where the tribe has adopted its own gross receipts tax ordinance; and where the federal government was involved with the planning, funding, construction, and inspection of the projects and has a continuing supervisory role in the operation of the projects.

PARTIES

The parties to the proceeding in the Tenth Circuit are as follows:

1. Plaintiff-Appellant and Cross-Appellee.
   Mescalero Apache Tribe
2. Defendants-Appellees and Cross-Appellants.
   Fred L. O'Cheskey, as Commissioner of Revenue and his successors in office;
   New Mexico Bureau of Revenue;
   State of New Mexico

OPINIONS BELOW

The Federal District Court for the District of New Mexico rendered a declaratory judgment and opinion in this case which is reported at 439 F. Supp 1063 (D.N.M. 1977) (Exhibit B of the Appendix). This decision was upheld on June 5, 1980 by the Tenth Circuit Court of Appeals in an opinion reported at 625 F. 2d 967 (10th Cir. 1980). The Tenth Circuit issued an Opinion on Rehearing on August 25, 1980 found at 625 F. 2d 990. These opinions are marked as Exhibit A, and are contained in the Appendix.

JURISDICTION

The judgment sought to be reviewed (Exhibit A) was entered on June 5, 1980. The Tribe filed a Petition for Rehearing. On August 25, 1980, the Tenth Circuit

entered its Opinion On Re-hearing (Exhibit A at p. 990) denying the Tribe's request for rehearing. This petition was filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari, pursuant to 28 U.S.C. Section 1254 (1).

CITATION TO STATUTES INVOLVED

Relevant provisions of the New Mexico Gross Receipts Tax Act (References are to NMSA 1953 Comp., Replacement Vol. 10, 1975 Pocket Supp. and to the corresponding provision of the 1978 Compilation. The 1978 compilation reflects some slight changes not relevant here.)

72-16A-1. Gross Receipts and Compensating Tax Act-Short Title—This act [72-16A-1 to 72-16A-19] may be cited as the "Gross Receipts and Compensating Tax Act." (7-9-1 N.M.S.A. 1978.)

72-16A-2. Purpose—The purpose of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax. (7-9-2 N.M.S.A. 1978.)

72-16A-3. Definitions—As used in the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19]:

> K. "service" means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property.
>
> "Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. However, sales of tangible personal property that will become an in-

gredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property, and . . . (7-9-3 N.M.S.A. 1978.)

72-16A-4. Imposition and rate of tax—Denomination as "gross receipts tax."

-A. For the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico.

-B. The tax imposed by this section shall be referred to as the "gross receipts tax." (7-9-4 N.M.S.A. 1978 -tax now is 3¾%.)

STATEMENT OF THE CASE

The Mescalero Apache Tribe (Tribe) is a federally-recognized Indian tribe with some 2100 members residing on a reservation in south-central New Mexico. Representatives of the Tribe entered into a treaty with the federal government on July 1, 1852. The treaty was duly ratified by the Senate and appears at 10 Statutes at Large 979. The Treaty provided that at its earliest convenience the federal government would designate the territorial boundaires of the Tribe. This was done by a series of Executive Orders which extablished a reservation of approximately 460,000 acres within the Tribe's aboriginal territory. The Tribe is governed pursuant to a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. Section 476.

In an attempt to capitalize on the scenic beauty of the Reservation and the surrounding area, the Tribe has attempted to develop tourism on the Reservation. The showcase of this effort is the Inn of the Mountain Gods resort complex (Inn) which consists of a hotel, golf course, artificial lake and dam, and additional recreational and support facilties. The Inn complements the Tribe's operation of the Sierra Blanca Ski Area. See Discussion in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). A recreation area and

campground have also been constructed as has a low income housing project for use by tribal members.

These projects were built by both in-state and out-of state construction companies owned and operated by non-Indians. Most contractors possessed federal trader's licenses. All of the projects are located within the exterior boundaries of the Reservation. New Mexico assessed its gross receipts tax against receipts from the contracts with the Tribe. The Tribe filed a declaratory judgment action in the Federal District Court for New Mexico challenging the State's authority to impose the tax. The District Court's jurisdiction was based on 28 U.S.C. Sections 1331 and 1362. With one exception, not relevant here, the District Court upheld the State tax. The Tenth Circuit affirmed in all respects.

In connection with the action in Federal District Court, the parties entered into an extensive stipulation of facts (not all relevant facts were stipulated). This stipulation is reproduced in relevant part in the Appendix as Exhibit "C". The stipulation provides that the legal and factual issues concerning the validity of assessments against contractors on the Inn project would be controlling as to all others. Therefore some background on this project is necessary.

Tourism first received serious consideration as a potential source of economic development for the Tribe in a development plan of the early 1960's. This plan was developed under the auspices of the Area Redevelopment Administration (ARA) which is the predecessor of the Economic Development Administration (EDA). The ARA funded an economic development officer during this period to work on tourism planning and feasibility.

In 1968 the Tribe submitted an application to EDA for a project consisting of three parts: a dam and artificial lake; hotel and appurtenant facilities; and miscellaneous public works. There was no allowance in the application for New Mexico's four per cent gross

receipts tax. Because of limited funds, only the dam and lake were funded. The EDA funded eighty per cent of the dam and lake and the Tribe the remaining twenty per cent. The Tribe sought private investment for the other portions of the project, but was unable to make satisfactory arrangements.

EDA funding for the hotel was subsequently obtained for the remainder of the project in time to go to bid in 1972. EDA funded fifty per cent of the revenue producing portions of the project and one hundred per cent of the portions which were not revenue-producing. It was the Tribe's responsibility to provide the balance.

For part of its share in the project, the Tribe obtained a $6,000,000 loan from the Bank of New Mexico. Ninety per cent of this loan is guaranteed by the Secretary of the Interior pursuant to the Indian Financing Act of 1974, 25 U.S.C. Section 1451 et. seq. Ten per cent of the loan is guaranteed by the Tribe through the assignment of a certificate of deposit to the bank.

Federal agencies other than EDA were involved in various aspects of the project. The Bureau of Indian Affairs provided an access road and approved the construction contracts and the plan of operation of the Inn; the Public Health Service contributed to the water system; the Corps of Engineers did preliminary dam design; and the Soil Conservation Service did soil analysis.

The grant for the hotel portion of the project was based on the amounts contained in the 1968 grant and with the effect of inflation, the Tribe faced problems in bringing the project within available funds. The hotel portion of the project was put out for bid as one project. Only one contractor submitted a bid. The bid was substantially in excess of available funds. To bring the project within available funds, the Tribe separated the project into smaller contracts to attract more bidders. It also redesigned the project downward deleting

some items in the original design. In addition, the EDA gave the Tribe the balance of its discretionary fund and waived its contingency requirements.

As the Tribe received bids on the various elements of the project, it realized that some of the contractors might have included an allowance for New Mexico's gross receipts taxes in their bids. The Tribe wrote to each contractor asking them to submit an alternate bid specifically omitting any amount for gross receipts taxes. The Tribe found it necessary to enter into an idemnification agreement with each contractor, agreeing to reimburse them for any tax ultimately found due to the State. The Tribe and the State have since agreed that the Tribe will pay the State directly if liability is ultimately imposed. Without deletion of the four per cent tax, the bids would have been over available funding. Most of the items deleted in order to bring the project within available funds have been built with later grants from EDA, but the project still does not include everything contained in the original plans.

EDA policy in regard to taxes is that if they are legally owed, they are an allowable item. There is no requirement they be included and EDA generally relies on the grantees representation as to whether they are legally owed.

The Tribe has adopted a comprehensive set of ordinances governing the conduct of business on the Reservation, including a gross receipts tax ordinance, a licensing ordinance, and an ordinance providing for tribal approval of plans and specifications on construction projects (See Stipulation). All of these ordinances have received federal approval. The tax was not collected from any of the contractors involved in this action since what the Tribe gained in taxes would be offset by increased project costs.

Once funding was accomplished, the EDA became involved in the construction phase. It approved the plans before the contracts were let for bids and ap-

proved the form of the contracts. The EDA approved all the contractors and the contracts entered into with each contractor. In addition to EDA approval, all contracts were approved by the Interior Department pursuant to 25 U.S.C. Section 81.

A representative of the New Mexico Construction Industries Commission, the state agency responsible for inspecting construction work in the state, visited the Mescalero Reservation before construction of the Inn began. His requests that the Inn contractors obtain New Mexico building permits and that he inspect their work were refused by the President of the Tribe and the representative left the reservation. The Construction Industries Commission made no further attempt to assert its jurisdiction over the Inn project. Nor did it attempt to require contractors not possessing a state contractors license to obtain one. Only agents of the Tribe and employees of the federal government inspected and supervised the construction of the Inn.

Now that the Inn is in operation, the plan of operation of the Inn and its annual budget are subject to federal approval by the Bureau of Indian Affairs, as is the Tribe's overall budget.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's Opinions in *White Mountain Apache Tribe v. Bracker*_____U.S._____, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980) and *Central Machinery Company v. Arizona State Tax Commission* _____U.S. _____ 65 L.Ed.2d 684, 100 S.Ct. 2592 (1980) and erroneously opens the door for state taxation of Indian development projects nationwide.

The Tenth Circuit Court of Appeals in a divided, en banc opinion upholding State taxing authority, found dispositive the determination that the legal incidence of the tax fell on the non-Indian contractor. Two dissenting judges, objected to the majority's failure

to engage in the preemption anaylsis appropriate to Indian cases.

Shortly after the Tenth Circuit opinion, this Court decided *White Mountain Apache Tribe v. Bracker*, _____U.S._____, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980) and *Central Machinery Co. v. Arizona State Tax Commission*, U.S._____, 65 L.Ed.2d 684, 100 S.Ct. 2592 (1980) which require reversal of that portion of the Tenth Circuit Opinion upholding State taxing authority. The Tribe filed a Petition for Rehearing advising the Court of Appeals of these opinions. Despite the controlling principles of those cases, the Court of Appeals issued a summary Opinion on Rehearing in which it indicated that all relevant factors had been considered in its initial opinion.

The Tenth Circuit opinion is in such direct conflict with this Court's recent decisions and with federal policy that it should be summarily reversed.

The importance of reversing the erroneous decision of the Tenth Circuit Court of Appeals is not accurately measured by the several hundred thousand dollars in tax liabilities that the Mescalero Apache Tribe will have to pay if the decision is not reversed (although this money obviously is of great importance to the Tribe). The true impact extends to the hundreds of Indian tribes nationwide, who, supported strongly by federal policy, are striving for economic self-sufficiency. Department of Commerce information indicates that since 1965, projects for Indians have been funded in thirty-two states. Total funding, including that for national projects is approximately $550,000,000. Source: Indian Projects Funded By EDA: August 26, 1965-September 30, 1977 and Addendum to Indian Projects Funded by EDA August 26, 1965-September 30, 1979. If the tribal contributions are added the figures would be much higher. These figures do not include projects funded by other sources. State sales or gross receipts taxes constitute an illegal surcharge on tribal development efforts.

In *White Mountain Apache Tribe v. Bracker*, supra, this Court noted that the interrelated concepts of federal preemption and tribal sovereignty provide independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. Id at 4899. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." 65 L. Ed. at 672.

Tribal sovereignty and federal preemption are so closely related in the context of tribal development that they merge. This is implicitly recognized in White Mountain Apache Tribe v. Bracker where the Court notes that the tradition of Indian sovereignty "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." Id at 672, 673. this point is underscored in footnote ten of that opinion which reads:

> The Indian Financing Act of 1974, 25 U.S.C. Section 1451 et. seq. states: "It is hereby declared to be the policy of Congress to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources, and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communies." Similiar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Section 450 et. seq. as well as the Indian Reorganization Act of 1934, 25 U.S.C. 461 et. seq. whose "intent and purpose...was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411

> U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) Cf. Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 66 Tex. L.Rev. 1195 (1978). (Emphasis supplied). Id. at 673.

See also 25 U.S.C. Section 1511 providing for interest subsidies on loans to Indian tribes. The effect of a state tax could be to negate the subsidy. And see generally 42 U.S.C. Sections 3121 et seq. which establishes the EDA. Indians are repeatedly singled out for special consideration to ensure the success of economic development projects on Indian reservations. See e.g. 42 U.S.C. Section 3131 (c) (100 per cent grants available for Indians); 3151 (b) (same) and 3132 (guaranteed minimum funding for tribal projects). An example of the effect of the imposition of state taxes on a project is provided by 42 U.S.C. Section 3131 (c), supra, which allow 100 per cent funding of some projects for Indian tribes, rather than the 80 per cent funding allowed for other entities. In a $5,000,000 project, the Secretary may give an Indian Tribe an additional $1,000,000 grant over and above what other entities could receive. Imposition of a 4 per cent tax on the total amount of the project would reduce this by $200,000.00–a substantial direct interference with federal policy and tribal development efforts.

It is not only these specific federal statutes which preempt state taxing authority. The Tribe's Treaty (10 Stat. 979) provides in article 1 that the Tribe is "exclusively under the laws, jurisdiction and government of the United States." And the New Mexico Enabling Act disclaims jurisdiction over Reservation affairs. 36 Stat. 557. Both are viewed in *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (S.Ct. 1977) as preempting state jurisdiction over the Mescalero Reservation.

The Tenth Circuit opinion produces a result in direct contradiction to the principles of White Mountain Apache Tribe v. Bracker. The State may not tax con-

tractors such as Pinetop in White Mountain Apache Tribe v. Bracker, since it might affect the Tribe's ability to receive the benefit of whatever profit the timber is capable of yielding. Id. at 676. However, under the Tenth Circuit's rationale, if the Tribe decides to use these profits for a development project on the reservation, this effort can be taxed by the state even though it involves a reservation activity in which the Tribe has a significant interest and is intended to generate value within the reservation. *Cf. Washington v. Confederated Tribes of the Colville Reservation* _____U.S._____, 65 L.Ed.2d 10 (1980).

While *Washington v. Confederated tribes,* supra, did not accept the principle that a tribal taxing ordinance could unilaterally preempt state law, it left open the possibility that a State taxing scheme under appropriate circumstances could interfere with tribal self-government. Here, the Tribe is generating value within the reservation and state taxing power constitutes a direct interference with tribal development and self-government.

The effect of the Tenth Circuit Opinion nationwide could be enormous. Virtually all tribal development projects of any size will involve both federal and tribal funding and participation at every stage. The BIA, having direct responsibility for carrying out the federal trust responsibility will also be involved. These agencies will be extensively involved in the planning, construction, and operation of the projects. The overall end to be achieved is a viable tribal project. A state tax cannot be allowed to endanger realization of this end.

Nor does the State have any claim to a right to taxes. The State has no more than a "general desire to raise revenue" without any responsibility or service justifying the assertion of taxes. *White Mountain Apache Tribe v. Bracker,* supra, at 677. Witness the total lack of State diligence to assert itself on the Reservation as to inspection of projects or the licensing of contractors.

The same elements are present here as in *White Mountain Apache Tribe v. Bracker:* 1) pervasive federal involvement and 2) lack of any genuine state interest other than a general interest in raising revenue. See also *Warren Trading Post v. Arizona Tax Commission,* 308 U.S. 685 (1965) and *Central Machinery Co. v. Arizona Tax Commission,* supra. The latter case, while dealing with trading in goods, nevertheless provides a background of federal concern that Indians not be interfered with by the State in their commercial dealings with non-Indians within Indian Reservations.

CONCLUSION

This case should be reviewed or summarily reversed because of its importance to tribal development efforts nationwide and because of the clearly erroneous decision of the Tenth Circuit.

Respectfully submitted,
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EXHIBIT A

MESCALERO APACHE TRIBE, Plaintiff-Appellant and Cross-Appellee,

v.

Fred L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico and his Successors in Office; the Bureau of Revenue of the State of New Mexico; and the State of New Mexico, Defendants-Appellees and Cross-Appellants.

Nos. 77-2102, 77-2103

United States Court of Appeals,
Tenth Circuit.

Argued Sept. 12, 1979.

Decided June 5, 1980.

Rehearing Denied Aug. 25, 1980.

Mescalero Apache Tribe brought suit against New Mexico Revenue Commissioner, and others, challenging state's right to levy its gross receipts tax on moneys received by non-Indian contractors for work on a resort complex and other projects within the boundaries of the state. The United States District Court for the District of New Mexico, Howard C. Bratton, Chief Judge, 439 F. Supp. 1063, upheld the constitutionality of the tax, and appeal was taken. The Court of Appeals, Seth, Chief Judge, held that incidence of New Mexico gross receipts tax was on building contractor, and constituted a cost of doing business; thus, New Mexico could constitutionally impose such tax on contractors who had done construction work for Mescalero Apache Tribe on a resort complex and other projects within boundaries of the state.

Affirmed.

Logan, Circuit Judge, filed concurring opinion.

Doyle, Circuit Judge, filed dissenting opinion in which McKay, Circuit Judge, joined.

McKay, Circuit Judge, filed dissenting opinion in which Doyle, Circuit Judge, joined.

McKay, Circuit Judge, dissented from denial of rehearing and filed statement.

1. Federal Courts — 433

Holding of a state court as to incidence of a tax of its state is generally determinative on consideration of issue by federal courts.

2. Taxation — 1268

Incidence of New Mexico gross receipts tax was on building contractor, and constituted a cost of doing business; thus, New Mexico could constitutionally impose such tax on contractors who had done construction work for Mescalero Apache Tribe on a resort complex and other projects within boundaries of the state. NMSA 1978, § 7-9-3, subds. F, K et seq.

Kim Jerome Gottschalk and Norman D Bloom, Jr. of Fettinger & Bloom, Alamogordo, N.M. (George E. Fettinger of Fettinger & Bloom, Alamogordo, N.M., on the brief), for plaintiff-appellant and cross-appellee.

Jan Unna, Sp. Asst. Atty. Gen., Santa Fe, N.M. (Toney Anaya, Atty. Gen. of New Mexico, and Daniel H. Friedman, Sp. Asst. Atty. Gen., Santa Fe, N.M., on the brief), for defendant-appellee and cross-appellant State of New Mexico.

Severson, Werson, Berke & Melchior, San Francisco, Cal., and George J. Ahlmann of Ahlmann & Sigler, Navajo, N.M., filed brief, for amicus curiae Navajo Forest Products Industries.

James W. Moorman, Asst. Atty. Gen., Washington, D.C., Victor R. Ortega, U.S. Atty., Ruth C. Streeter, Asst. U.S. Atty., Albuquerque, N.M., and Carl Strass and Robert W. Frantz, Dept. of Justice, Washington, D.C., filed brief, for amicus curiae United-States.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN, Circuit Judges.

SETH, Chief Judge.

The State of New Mexico sought to impose its gross receipts tax on the several contractors who had done construction work for the Mescalero Apache Tribe on a resort complex and other projects within the boundaries of the State of New Mexico. The work was performed for the Mescaleros and on reservation lands. The trial court held that the tax was imposed on the contractors and they were liable for it to the State of New Mexico. The trial court held that the Tribe had purchased materials on the housing job constructed by Quiller Construction Company, Inc. and these purchases were not within the gross receipts tax by reason of a specific exemption.

The basic issue on this appeal is the application of the New Mexico gross receipts tax. The state act makes the materials used and work of a building contractor taxable as services. It is levied on the contractor. N.M. Stat. Ann. §§ 7-9-3 F, K *et seq.* (1978). The contractors here concerned were individuals or entities engaged in the general construction business.

The state tax is on the privilege of engaging in the business of a building contractor in the state. The contractors were engaged in such a business, and built

and supervised the building of the resort and housing. There is nothing in the record to show that "all their activities" were on reservation lands and the indications are otherwise. The construction was, of course, done on Indian land and this is all the record shows. The New Mexico tax has been considered by the New Mexico courts to be a privilege tax. *Mescalero Apache Tribe v. Bureau of Revenue,* 88 N.M. 525, 543 P. 2d 493; *First Nat. Bank of Santa Fe v. Commissioner of Revenue,* 80 N.M. 699, 460 P. 2d 64; *Bell Telephone Laboratories v. Bureau of Revenue,* 78 N.M. 78, 428 P. 2d 617. The incidence of the tax has been so held to be on the seller—the contractor—as the one providing the services.

[1] The holding of a state court as to the incidence of a tax of its state is generally determinative on the consideration of the issue by the federal courts. *See Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546, and *Federal Land Bank v. Bismarck Lumber Co.,* 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65.

[2] This court considered the same tax in *United States v. State of N.M.,* 581 F.2d 803 (10th Cir.), and decided that the sovereignty of the United States did not prevent the imposition of this tax on a contractor providing services to the federal government on federal lands. We there also necessarily considered the incidence of this tax.

> "Thus, the decisive issue in this case is whether the legal incidence of the challenged New Mexico taxes falls on the United States, regardless of where the economic burden ultimately rests . . . . . .
>
> . . . . . .
>
> "The Act specifically makes the gross receipts tax appliacable to the doing of business in New Mexico without reference to whether that business is with the United States and,

> with uniformly applied exceptions, assesses the tax upon anyone receiving compensation. There is no evidence that the tax interferes with the performance of federal functions. The tax is not directly imposed on the United States and, although the contractors pass the tax on to the United States they are not required by the Act to do so."

The incidence of this tax cannot be different here just because Indians are involved. The tax is the same, the incidence remains the same, and it is clearly on the contractor. The Indians here are in no different a position than was the federal government in *United States v. State of N.M.*, 581 F. 2d 803 (10th Cir.)

At the outset it might be well to state what this case in *not* about. It is not about the power to tax Indian lands, nor about taxation of income from Indian lands, nor the income of Indians on such lands. These issues have long been settled, and the state has disclaimed that it has any such rights. The case is also not about Indian lands generally. Instead, we are only concerned with a state privilege tax on a contractor engaged in business in New Mexico with the measure of such tax to include construction of the lands set apart for the Mescaleros. The case is also not about an indemnity agreement whereby the Mescaleros undertook to indemnify the contractors for the tax.

The tax here concerned could have been included in the funding from the E.D.A. No reason appears why this was not done. The trial court of this stated:

> "The Tribe had not budgeted such taxes as a cost in its proposal to the E.D.A. for funds to build the complex, although E.D.A. does permit inclusion of the cost of passed-on state taxes in a grant for a project. After the initial bids for various aspects of the complex were received, the Tribe told the contractors that the four percent gross receipts tax would not be due to the state and instructed them to

> submit alternative bids omitting such costs. The Tribe found it necessary to enter into an indemnification agreement with each contractor, agreeing to reimburse each for any such tax that might be determined to be due the state. If the taxes in question are found to be due, the amount of money owed the state is substantial, and the cost is imposed upon the Tribe by virtue of its indemnification agreements with the contrators." *Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, at 1071-72 (D.N.M.).

The only reason this point is mentioned is because the way it was handled by the Tribe makes it *appear* that the incidence of the tax was on the Tribe when it was not. The point does not appear to be otherwise significant. The asserted direct "burden" on the Tribe was thus by its own election to indemnify the contractors. The result in this case should not be determined or influenced in any way by such a contractual arrangement.

It is apparent that in doing business in New Mexico the contractors here benefitted from the state laws and the state governmental activities. The trial court so found and also found the Mescaleros also so benefitted. As the trial court stated, the Indian lands concerned were obviously within New Mexico. The gross receipts tax on contractors, and all others, obviously is a cost of doing business as are the employment security taxes, social security taxes, income taxes, and all the overhead that goes into the jobs, and must be recovered from the work charges. The tax neverthless is on the seller. An indirect burden obviously is initially on the one for whom the services are performed—thus on the Tribe or the Government. However, it is equally apparent that this indirect burden is again passed on to the users of the resort and again by them. The tax becomes dispersed. There is no way of telling where the ultimate economic burden falls. This is the reason why the initial in-

cidence of the tax must be the determinative factor. It is the only significant matter for our consideration.

The state has extensive powers over Indians like any other persons and on reservations which may be exercised if it chooses to do so. Thus the Supreme Court in *Kake Village v. Egan*, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (a non-reservation group), said after referring to the cases involving the authority of the states:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

See generally, Craig, 9 N.M.L. Rev. 221 *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483, is discussed, and it is pointed out that other decisions have reduced its scope. In the *Kake* opinion the Court points out as to *Worcester:*

> "By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." (Citations omitted.)

The Court then states how "the influence of state law increased rather than decreased." This referred to the policy after 1934. The Court in the *Kake* opinion again mentions how Justice Marshall's decision in *Worcester*, that the state cannot penetrate the reservation boundaries, "has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." There was *no reservation* involved in *Kake*, but it included activities provided by Treaty.

Again, the Supreme Court said in *Mescalero Apache*

Tribe v. Jones, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114.

> "The upshot has been the repeated statements of this court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."

This clearly states again the position of, or application of state laws on the Mescalero Reservation. This leaves no room for any doctrine of preemption. The relationship of the parties is defined. The parties are defined, and are only the state and Congress.

The fact that some of the services, and most of them, were performed on Indian land is thus not a factor to be considered under the above decisions. The tax is on the contractor and on the privilege of doing business in New Mexico. It is also apparent, as the trial court points out, there is at least an initial economic impact on the Tribe since the contractor can pass the tax along. This is the initial indirect burden, and in the normal course of events would have been absorbed in the E.D.A. funding or grant. The Tribe chose instead to accept the "indirect burden" and whether the Tribe so absorbs it until it in turn passes it on to the users of the resort, or whether the Government does, is of no consequence. This is into the morass of indirect burdens.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96, is significant in that it concerned, in *part*, a tax on the non-Indian buyer of cigarettes on the reservation. The Court there used the incidence of the tax, which was on the buyer, to validate it as to such sales. There, of course, was no indirect burden argument, but the state tax on a transaction on the reservation was upheld. The incidence of such tax was the factor considered. Here we have the tax incidence also outside and also on a non-

Indian. The only difference is the indirect burden argument which is *not* persuasive. *See also* our *Ute Indian Tribe v. State Tax Comm'n.*, 574 F. 2d 1007 (10th Cir.).

In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96, the Court referred to *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114. In the footnote on page 481 of 425 U.S. (page 1645 of 96 S. Ct.) the Court said in part:

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine . . ."

In *Moe* the Court further observed that the tax in *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165, was imposed directly on the seller. There was no claim in *Warren* that the tax could be imposed on reservation sales to non-Indians. The position of the trader in *Warren* as licensed and regulated was obviously a very significant factor. The Court in *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129, explains that part of the reason was the policy of Congress as to the Navajo Reservation and tribal self-determination thereon. *Warren* concerned an entity long regulated by Congress. It concerned only income from sales to Indians (as presented to the Court), and was on a permanent enterprise on the reservation. The licensing in the case before us was of course a pretext or a fiction and in no way was comparable to the licensing in *Warren*. See the trial court finding of fact as to the licensing.

The Treaty with the Mescaleros does not assist us in arriving at a solution. The Mescaleros came under the sovereignty of the United States by the Treaty of Guadalupe Hidalgo with Mexico. The sovereignty over the Mescaleros exercised by Spain in the sixteenth and seventeenth centuries was actual as was, of course, that exercised by the government of Mexico. The sovereignty was transferred over all the inhabitants of what became New Mexico from Spain to Mexico to the United States by treaties. The record contains a "Treaty with the Apaches." This was an agreement entered into with *some* Apaches, including some Mescaleros, and was ratified by Congress. It is binding on the United States but there appears to have been, at least at one time, some doubt as to whether it was binding on any Apaches except those who signed it. It is apparent from the events which followed it that the Apaches did not agree among themselves as to who was bound or which bands were bound. But be that as it may we must assume for these purposes that the Treaty was valid. It was a treaty of "peace and friendship." As this was all it purported to be, it established no rights generally for either party nor any rights in land. *See Choate v. Trapp*, 224 U.S. 665, 32 S. Ct. 565, 56 L. Ed. 941. The Mescaleros were then under the complete sovereignty of the United States. The Treaty thus does not appear to be of any significance as to our problem.

Thus we are left with the non-discriminatory state gross receipts or privilege tax the incidence of which is on the building contractors. The contractors benefitted from state governmental activities and services during the time they performed the services taxed. It is obvious that the indirect burden is on the one for whom the services were performed as recognized in *United States v. State of N.M.*, 581 F. 2d 803 (10th Cir.). This indirect burden was not enough there, and it is not enough here. The only measure here is whether this indirect burden constitutes an interference with the internal affairs of the Mescaleros. It is a non-discriminatory tax levied on all contractors. It is something everybody pays. The indirect

burden is, as we have said above, something to be again passed on as the Tribe engages in its resort and other business. It is the indirect consequence of taxes *on others* which reaches the Mescaleros as do all other costs, levies and taxes on persons with whom they do business. If this is an interference, all such taxes and levies on those doing business with them, the suppliers of such persons, the wholesalers and the manufacturers are likewise an interference. All these taxes affect the *money* of the Mescaleros the same way, and the money available for other purposes.

We find no merit to the several other contentions and issues advanced by the appellants.

The judgment of the trial court is AFFIRMED.

LOGAN, Circuit Judge, concurring:

I join in Chief Judge Seth's opinion, but write separately to point out certain controlling distinctions between this case and *Merrion v. Jicarilla Apache Tribe*, 617 F. 2d 537 (10th Cir., 1980), treating an Indian tribe's power to tax.

In my view, at issue in this case is a question we did not address in *Merrion*—"whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians," *id.* at 546 (emphasis in original), in violation of the Indian Commerce Clause, art. I, § 8, cl. 3, of the United States Constitution. To answer this question it is necessary to consider the nature of the tax, its effect on Indian self-government, and the nature and extent of federal involvement in the Tribe's business venture. The other and substantially similar question in this case is whether the state's tax is preempted by federal regulation in the area and hence invalid under the Supremacy Clause. *See Moe v. Confederated Salish & Kootenai Tribe*, 425 U.S. 463, 481 n.17, 96 S. Ct. 1634, 1645 n.17, 48 L Ed. 2d 96 (1976).

The gross receipts tax involved here has some in-

come tax and some sales tax characteristics. As applied to money paid for performing services in New Mexico, it is not unlike a state income tax without the deductions usually allowed. Generally speaking, the validity of such a tax in the context here depends upon its "legal incidence"; who bears the ultimate economic burden has no relevance. *Gurley v. Rhoden*, 421 U.S. 200, 207, 95 S. Ct. 1605, 1610, 44 L. Ed. 2d 110 (1975). Is this gross receipts tax similar to a tax on Indian personal property located within a reservation, prohibited by *Moe v. Confederated Salish & Kootenai Tribe*, 425 U.S. 463, 480, 96 S. Ct. 1634, 1644, 48 L. Ed. 2d 96 (1976), or is its incidence upon non-Indians similar to the cigarette tax upheld in that decision?

The determinations of the state courts on legal incidence of state taxes are given great weight, and if consistent with a reasonable interpretation are conclusive. *American Oil Co. V. Neill*, 380 U.S. 451, 455—56, 85 S. Ct. 1130, 1133—1134, 14 L. Ed. 2d 1 (1965). New Mexico has construed the gross receipts tax as placing the legal incidence upon the person in the position of the contractor here. *First Nat'l Bank v. Commissioner of Revenue*, 80 N.M. 699, 705, 460 P. 2d 64, 70 (Ct. App.), *cert. denied*, 80 N.M. 707, 460 P. 2d 72 (1969), *appeal dismissed*, 397 U.S. 661, 90 S. Ct. 1407, 25 L. Ed. 2d 643 (1970). Considering the tax in the context of contractors dealing with the United States government, this Court, after careful analysis, ruled that the incidence was upon the contractor and that New Mexico could collect the tax. *United States v. New Mexico*, 581 F, 2d 803 (10th Cir. 1978).

The legal incidence, in some cases, may be determined by the contract between the parties. As recognized in *United States v. New Mexico, id.* at 808, the parties might have arranged to make the United States, rather than the contractor-builder, the purchaser of goods. Based upon the construction of the contract here that the contractors were made agents for the Tribe in the purchase of materials, I agree that the New Mexico use tax was properly held to be inap-

plicable in the instant case. But there are limitations on the ability to control the incidence. The gross receipts tax attaches to the payments received by the contractors for their services; the Tribe cannot be made the provider of these personal services. Therefore, an agreement to reimburse the contractors if the New Mexico tax is levied does not shift the incidence of the gross receipts tax on payment for services away from the contractors.

Thus, under principles ordinarily applied the tax is valid. Is it nevertheless invalid because of its effect on Indian self-government? *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), struck down a state income tax levied against "a reservation Indian whose entire income derives from reservation sources." *Id.* at 165, 93 S. Ct. at 1258. The Court there carefully noted it was not concerned "with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *Id.* at 168, 93 S. Ct. at 1260. It distinguished the Indian sovereignty cases in discussion fairly applicable to this case:

> It must be remembered that cases applying the *Williams [v. Lee*, 358 U.S. 217, 79 S.Ct.269, 3 L.Ed.2d 251 (1959)] test have dealt principally with situations involving non-Indians. See also *Organized Village of Kabe v. Egan*, 369 U.S. at 75—76, 82 S. Ct. 562, 7 L.Ed.2d 573. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self government would be affected.

411 U.S. at 179, 93 S. Ct. at 1266.

As stated previously, the state's tax on the contractors' receipts for services is in essence an income tax without the usual deductions. We are familiar, of course, with the concept that the nation and a state may tax all of the income of residents from whatever

source and wherever derived, and may tax income of nonresidents earned within the jurisdicition. Further, individuals and businesses may have the same earnings taxed by federal, state and local governmental entities.

If the tax at issue here may be said to be levied upon non-Indians, is nondiscriminatory, and does not preclude a possible similar tax by the Tribe on activities conducted on the reservation, I do not believe the Indians' right to self-government is impaired. These circumstances are present here. The direct burden of the tax is not upon the Tribe, but upon the non-Indian contractors. Business with the Indians is not singled out for special treatment; the tax applies to all transactions within New Mexico. Nothing in this case would seem to preclude the Tribe from exercising its legitimate taxing powers. *See Merrion v. Jicarilla Apache Tribe, supra.* The Tribe has apparently enacted its own gross receipts tax, but has not applied it to these transactions. That it did not impose the tax here is a reflection of its understanding that the contractors simply would have raised the amount of their bids by that amount. *See* Appellant's Brief at 26.

I turn now to the preemption or territorial argument discussed most fully in part II of Judge McKay's dissenting opinion, which is relevant to both the Commerce Clause and Supremacy Clause analyses. At first blush it seems significant that by the language of the treaty the Tribe submits itself "exclusively" to the jurisdiction of the United States, Treaty with the Apaches, July 1, 1852, 10 Stat. 979; and that the Enabling Act for New Mexico, 36 Stat. 557, 558—59 (1910), says the Tribe is to remain under the "absolute jurisdiction and control" of the United States. But the Supreme Court has construed this exclusivity narrowly. This New Mexico tax and the same tribe were involved in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973), which addressed the question whether the New Mexico tax

could be levied against revenues earned by the tribe from operating a ski resort outside the reservation. En route to holding that the tax could be so applied, the Court discussed the intergovernmental immunity doctrine in the following language:

> The intergovernmental-immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians. The theory was that a federal-instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 58 S. Ct. 623, 82 L. Ed. 907 (1938); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612 (1943); and *Oklahoma Tax Comm'm v. Texas Co.*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation. Rather, the Court held that Congress has the power "to immunize these lesses from the taxes we think the Consitution permits Oklahoma to impose in the absence of such action" and that "[t]he question whether immunity shall be extended in situations like these is essentially legislative in character." *Oklahoma Tax Comm'n v. Texas Co., supra*, at 365—366, 69 S. Ct. 561.

Some of these contractors were New Mexico corporations. Since that state could tax income, and, I believe, gross receipts of the resident companies from any source the only question would seem to be

whether the law was intended to be applied to gross receipts from activities upon the reservation. It seems clear New Mexico intended to go as far toward this end as possible. *See Prince v. Board of Education*, 88 N.M. 548, 543 P. 2d 1176 (1975).

Some of the contractors doing work on the reservation are not residents of New Mexico. New Mexico would seem to have power to levy its gross receipts tax on them only if the services were performed in New Mexico. *See* N.M. Stat. Ann. § 7-9-3 F (1978). Is the reservation "in New Mexico" in the legal sense? Certainly the state seems to think so. *See Prince v. Board of Education, supra.* While the Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973), recognizes the state may not apply its use tax to personal property permanently affixed to the Tribe's tax exempt land, it infers that in the absence of federal legislation, state taxation of non-Indians' activities on Indian lands is generally permissible. *Id.* at 150, 93 S. Ct. at 1721. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976), upheld a Montana tax on sales of cigarettes to non-Indians on the reservation without reference to the purchares' state of residence.

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965), struck down a state gross receipts tax levied against a federally licensed merchant doing a retail trading business on an Indian reservation. The case is distinguishable on its facts; the contractor's activities here are not subject to that licensing act and in *Warren Trading Post* there was specific federal regulation. The opinion does not treat the legal incidence issue. Although *Warren Trading Post* is somewhat sweeping in language, and lends support to a preemption decision favorable to the Tribe, I am convinced that recent opinions of the Supreme Court, some of which are cited above, indicate that application of the state gross receipts tax would be accommodated in the situation confronting us.

Finally, the extent of the federal government's role in this area, as a measure of federal interest in Indian affairs, is significant. Federal participation and interest in this particular business venture is extensive, but that alone is not enough to immunize these contractors from state taxation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 93 S. Ct. 1267, 1272, 36 L. Ed. 2d 114 (1973) (federal government conducted the feasibility study, supplied the equipment and loaned the Tribe the construction money). Neither am I persuaded by the Tribe's argument that the federal policy of encouraging Indian economic development, *see, e. g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, precludes state taxation here. Construction of the resort complex was financed primarily by the Economic Development Administration of the United States Department of Commerce, which permits inclusion of the cost of passed-on state taxes in a grant.

For these reasons I concur in the affirmance of the trial court's judgment.

WILLIAM E. DOYLE, Circuit Judge, dissenting in which McKay, Circuit Judge, joins:

I respectfully dissent.

INTRODUCTORY

The question in the case is whether New Mexico is authorized, under the Constitution and laws of the United States to impose a tax on the privilege of doing business measured by the gross receipts of contractors who performed work on the tribal lands, the actual burden of which was and had to be absorbed by the Tribe.

The majority upholds the tax saying that the "incidence" of it falls on the contractors. It is true that the tax is measured by the gross receipts of the contractors who were performing work for the Tribe—its construction of the Tribe's Inn of the Mountain Gods

resort complex, a tribal housing project, and a recreation area and campground. All of these projects were located on the tribal property and although the contractors were non-Indians, they were acting for and on behalf of the Tribe. The Tribe issued traders' licenses to each of the contractors. Also, the Tribe undertook to indemnify the contractors for any gross receipts tax which they were required to pay. The sole attempt of the majority to justify ignoring the impact on the Tribe is found in its use of the term "incidence of the tax." The majority opinion repeats this several times.

The effort of the majority opinion and the opinion of the district court has been to distinguish between taxes which are on the Tribe directly and those which ultimately become the Tribe's burden. The latter, it is argued, are permissible, whereas the former are not. Thus, it is the form of the tax which becomes the important factor. Whether the Tribe is the victim is unimportant so long as the tax is aimed at the contractor. Admittedly, though, it would not be valid if it were *directly* against the Tribe. So, then, if the Tribe were to act as its own contractor and if it had hired the contractors, architects and other agents, the tax in its present form could not be levied against the Tribe, and it would be questionable if levied against the contractors. All of this emphasizes that the structure of the majority opinion, like the New Mexico statute, is purely formal in that it ignores the fact that the *burden* comes to rest on the Tribe; that the cost to the Tribe will necessarily be increased if the contractors are required to pay the tax; that the program of the United States to develop tribal independence would be impeded. An approach which disregards the impact of the tax in favor of who is first in line cannot be upheld. It fails because it never asks the question whether tribal activity is, in truth, the object of the tax and whether its burden falls on the Tribe or on the United States, whereby the broader inquiry would yield the answer that the Tribe is indeed the ultimate victim. The test used by the majority that the "incidence" of the tax falls on the contractors is vague and meaningless. To approve it would allow New Mex-

ico to insert its foot in the door and make its entry into the Indian revenue scene. New Mexico would be allowed to exact revenue in the complete absence of evidence showing governmental support to either the Tribe or the contractors. Strictly speaking, the business which was being taxed was being carried on in the Tribal areas which are not subject to state regulation.

We will attempt to show that the subject tax is contrary to historical documents, the Supreme Court decisions, and the other recognized criteria.

I.

HISTORICAL BACKGROUND

The present conflict between state and Tribe is not new. It has been present in the courts and in the Congress from almost the early 1800's. One of the original decisions was rendered by the Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). Chief Justice Marshall, in there writing for the Court, described the relationship between the state and an Indian tribe. The plaintiff in error was indicted under Georgia law for residing in that part of the Cherokee nation attached by the laws of the State of Georgia to the County of Gwinnett without a license or permit from the state. The effort on the part of the State of Georgia to exercise its authority on the Cherokee Reservation was rejected by the supreme Court. The opinion declared that the Cherokee nation was a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia "can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States. The act * * * is, consequently void, and the judgment a nullity." 31 U.S. (6 Pet.) at 561. The Court conceded that Georgia might

regulate the Cherokee nation outside the latter's territory, but within the Reservation, it was said, the Georgia laws were "repugnant to the constitution, laws and treaties of the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia * * *" 31 U.S. (6 Pet.) at 561-562. The notion that an Indian tribe enjoyed sovereignty equal to that of the state, which idea was expressed in *Worcester,* did not continue to be accepted.

Less expansive language has been used in subsequent cases, a fact which was noted by the Supreme Court in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). The court (in *Jones)* also called attention to the fact that although the state may have some undefined police power in connection with Indian reservations, that it does *not* have the power to levy taxes on Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.

The part of the opinion in *Jones* which commented on the expressions in *Worcester v. Georgia, supra,* follows:

> The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia,* 6 Pet. 515, 556-561, 8 L. Ed. 483 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 93 S. Ct.1257, 36 L.Ed.2d 139; *Organized Village of Kake v. Egan,* 369 U.S. 60, 71-73, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). The upshot has

> been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra,* at 75, 82 S. Ct. 562; *Williams v. Lee,* 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *New York ex rel. Ray v. Martin,* 326 U.S. 496, 499, 66 S. Ct. 307, 90 L. Ed. 261 (1946); *Draper v. United States,* 164 U.S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896). Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n, supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148, 93 S. Ct. at 148. The above shows recognition by the Court that the broad concept enunciated by Chief Justice Marshall in *Worcester* has eroded as applied to matters other than taxation. It has, in the area of state taxation, continued to be viable absent expressed cession of jurisdiction or Congressional consent. So, this present effort of New Mexico is on its face suspect and calls for close scrutiny.

Jones also teaches that the applicable treaty and special federal statutes, together with state enabling legislation, must be considered.

Article 1 of the Treaty with the Apaches (July 1, 1852), states:

> Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are

> lawfully and exclusively under the laws, jurisdiction, and government of the United States of America and to its power and authority they do hereby submit.

Article 11 brings out the exclusiveness of the United State's authority over the tribe and its members. It provides:

> Article 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States, and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

New Mexico was admitted to the Union long after the signing of the Treaty. Its effective date was 1910. *See* 36 Stat. 557 (1910). The contemporaneous Enabling Act contains a disclaimer by New Mexico of the right to public or Indian lands and acknowledged that those lands are subject to the absolute jurisdiction of the United States. It makes clear that New Mexico cannot levy taxes on the tribal lands. This Act of Congress acknowledges that the state is not precluded from taxing property *outside* of an Indian reservation owned or held by any Indian, "save and except such lands as have been granted or acquired by an Act of Congress."

Article XXI, Section 2 of the New Mexico Constitution, a Compact with the United States, contains a forfeiture and disclaimer provision on the part of New Mexico of all lands held by any Indian or Indian tribe, the right or title to which was acquired through the United States. This provision declares that all such

lands "shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe."[1]

II.

APPLICABILITY OF THE FEDERAL PROHIBITION AGAINST A STATE TAX ON THE RESERVATION

The majority opinion virtually ignores the mainline Supreme Court decisions on this subject. Not only does it fail to come to grips with the important aspect of *Mescalero Apache Tribe v. Jones, supra*, it omits the parts of the *Jones* opinion which declare that in the special area of state taxation, in the absence of cession of jurisdiction or other federal statutes permitting it, there has been no provision for the states taxing Indian reservation lands or Indian income from within the boundaries of the reservation. In addition, the reference in *Jones* to *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), saying that it "lays to rest any doubt in this respect (that is, the immunity of the tribe from taxation within the boundaries of the reservation), by holding that such taxation is not permissible absent Congressional consent," is likewise omitted.

Nor does the majority mention *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710

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[1] It might be argued that the tax here, since it is measured by gross receipts, is not a tax on the land. The matter at issue in *Jones* was a tax that was imposed on the gross receipts of a ski resort from the sale of services and tangible property. Also, the state assessed compensating use taxes against the Tribe in the amount $5,887.19 in 1968 based on the purchase price of materials used to construct two ski lifts at the resort. The property involved was located outside the Reservation. The Court said that a tax on the land itself was exempt under the Indian Reorganization Act. The Court also expressed the view that the statutory tax exemption for lands may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land even though it was ruled that that principle did not apply in the *Jones* case. But the state would have been precluded from levying the taxes in question if the ski area had been located within the tribal boundaries inasmuch as the State is prohibited from levying taxes on Indian lands or income within the reservation.

(1976), an even later decision of the Supreme court which reiterates the inability of the state to tax and contains a thorough discussion of limitations on state taxation of Indian tribes. It, like the other decisions, discusses fully the lack of state power power to tax tribal members and tribal property located on the reservation absent an express consent by the Congress of the United States. Thus, the majority determination is plainly at odds with *Bryan*.

In *Bryan*, the Supreme Court considered the authority of Minnesota to impose a personal property tax on the mobile home of a Chippewa Indian. The mobile home was located on federal trust land. The view that the Minnesota court had taken was that the state was granted implied authority to tax in Public Law 280, § 4(a), 28 U.S.C. § 1360(a), which provides that certain states have "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . "

The Minnesota Supreme Court construed the term, civil laws of general application, as including tax statutes because of a proviso in section 4(b), 28 U.S.C. § 1360(b), which denied authorization of the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe that could be interpreted as limited to property that was held in trust by the United State.

Needless to say, the supreme Court rejected the narrow and strained construction given by the Minnesota court to the statute. It said that the state's power to tax reservation Indians had been clarified in the several cases whereby Indian immunity absent congressional consent had become established, citing

Mescalero Apache Tribe v. Jones, supra, and *McClanahan.* So, notwithstanding a federal statute which was not altogether clear, although not susceptible to the construction given by Minnesota, the Supreme Court denied its application.

Also cited by the Supreme Court in *Bryan* was *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 465, 96 S. Ct. 1634, 1637, 48 L. Ed. 2d 96 (1976), which is relied on by the majority opinion, but which was held by the Court in *Bryan* to be consistent with the line of cases holding that in the absence of congressional consent, the state was disabled from imposing a personal tax on motor vehicles owned by tribal members living on the reservation.

We need not relate the care given to construction of the statute that was in issue in *Bryan.* It is, however, helpful to refer briefly to *McClanahan v. Arizona,* 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

The Arizona tax measure which was sought to be imposed on reservation Indians in *McClanahan* was a personal income tax on income derived from reservation sources. The supreme Court rejected the argument that the imposition of the tax on a single Indian did not threaten the right of the tribe to self-government. The *McClanahan* Court recognized that the Indian sovereignty doctrine had relevance at least to provide a backdrop for reading the applicable statutes and treaties. *McClanahan* gave effect to the treaty, and the decision is significant also for its broad determination that the state was barred from imposition of a tax because it was seeking to spread state sovereignty into the Indian reservation.

Nor is *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965), to be ignored. Indeed, *Warren* is closely analogous to the case at bar. Arizona had sought to collect a tax of two percent on the gross income derived from sales of Warren Trading Post Company,

which was conducting a retail business with Indians on the Arizona part of the Navajo Indian Reservation. Its operation was under a license granted pursuant to the relevant statute. Here again, the Supreme Court of Arizona had upheld the statute and the decision went proceeded directly to the Supreme Court. The effort to tax these proceeds was disallowed because it was inconsistent with federal statutes applicable to the Indians on the Navajo Reservation. In support of its decision, the Court referred to the traditional federal regulation of Indian traders throughout the years which sought to leave the Indians on the reservation free to run it and its affairs without state control. As a result of this absence of state regulation, Arizona did not carry on any governmental responsibilities on the tribal lands. Also pointed out was the fact that the tax frustrated the congressional purpose of insuring that no burdens were being imposed on Indian traders except as authorized by Acts of Congress. Emphasized also was the result of the imposition of financial burdens on the trading post and on the Indians, and resultant disturbance of Congress' design to protect the Indians from unfair pressures. In addition, since the federal legislation had left the state without duties or responsibilities on the reservation, the court said that it was unbelievable that Congress intended to give the state the privilege of levying this tax. The Arizona Supreme court decision was, for the foregoing reasons, reversed.

We are not unaware that this is a summing up that the Supreme court has allowed state sales taxes to be applied to non-Indians on the reservation. Such taxes were imposed in *Moe v. Salish & Kootenai Tribes, supra,* and also in *Ute Indian Tribe v. State Tax Com'n, etc.,* 574 F. 2d 1007 (10th Cir. 1978), *cert. denied,* 439 U.S. 965, 99 S. Ct. 452, 58 L. Ed. 2d 423. Such taxes imposed on non-Indian consumers do not run counter to the basic restrictions governing a direct or indirect imposition of taxes on Indians or on a tribe.

It must be concluded that, unlike the situation that

was present in *Moe, supra*, the tax here is certain to be the burden of the Tribe and of the Indians, and so the majority opinion is incorrect in urging that *Moe* governs this case. It plainly does not. Finally, it is not surprising that the majority opinion soft-pedals the important recent decisions of the Supreme Court, because these cases dictate a conclusion opposite that which the majority reached.

III.

INAPPLICABILITY OF THE LEGAL INCIDENCE TEST

It is submitted that the legal incidence test has no problem-solving value in the present factual context. The main objection to this incidence approach is that it calls for disregard of the substance of the tax, how it affects the members of the Tribe and the Tribe itself, whether it impedes the basic policies of the United States, which are to develop tribal independence, and the other persistent feature, to protect Indian sovereignty where taxation measures are in question.

The New Mexico Gross Receipts and Compensating Tax Act was enacted in 1966. It is reported in New Mexico Stat. Annot., 1978, Ch. 7, Art. IX, Section 1, *et seq.* The purpose of this Act is reported in NMSA 7-9-2, which provides as follows:

> The purpose of the Gross Receipts and Compensating Tax Act is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico from the importation into the state property without payment of a similar tax.

Thus, it is intended to be a tax on the privilege of engaging in certain activities within New Mexico. 1978 NMSA 7-9-4 provides:

> A. For the privilege of engaging in business, and excise tax equal to four percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The Tax imposed by this section shall be referred to as the "gross receipts tax."

So, therefore, the New Mexico Gross Receipts and Compensating Tax Act is supposed to close up a loophole as far as the introduction of goods into New Mexico is concerned, and it is also designed to derive revenue from the privilege of engaging in business in New Mexico. It necessarily contemplates that New Mexico sovereignty is at work providing governmental services to the taxed corporations and furnishing protection to them. Where, however, the activity of these companies is conducted in its entirety within the Mescalero Apache Reservation boundaries, it is impossible to see that New Mexico is granting any privilege that is compensable. There are suggestions in the majority opinion and in the opinion of the trial judge that the contractors use New Mexico highways to get to the construction sites, but this, however, is ordinary activity engaged in by all persons who drive on interstate and other highways in New Mexico. It is outside the general purposes that are stated in the statute.

Therefore, it is, on its face, highly questionable.

The majority says that this court is bound by the construction on the part of the New Mexico courts which have held that the legal incidence of the tax is on the contractor. The mere statement of this refutes it. This court is not bound by a New Mexico determination which is so purely federal, which is related to the provision in the Commerce Clause, and which has such a long tradition of federal character. *See Diamond National v. State Equalization Bd.*, 425 U.S. 268, 96 S.Ct. 1530, 47 L.Ed.2d 780 (1976). *Diamond* is a brief per curiam opinion, and the question was whether state and local sales taxes fell upon a national bank as the purchaser of goods rather than upon vendors, whereby the bank was exempt from the taxes under a federal statute which was in effect at the relevant time. The Supreme Court said:

> The judgment is reversed. We are not bound by the California court's contrary conclusion and hold that the incidence of the state and local sales taxes falls upon the national bank as purchaser

> and not upon the vendors. The national bank is therefore exempt from the taxes under former 12 U.S.C. (section) 548 (1964 ed.), which was in effect at the time here pertinent. *First Agricultural Nat. Bank v. Tax Comm'n,* 392 U.S. 339, 346-348, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968).

425 U.S. at 268, 96 S.Ct. at 1530.

In *First Agricultural Nat. Bank v. Tax Comm'n. supra,* a Massachusetts sales tax and use tax as applied to national banks was held to be invalid because it was in one of the areas in which the Congress had consented to states taxing national banks.

An important objection to the use of the "legal incidence" test is that it is so vague and abstract and thus it can give one any result that he seeks. Consequently, it is merely a use of high sounding words which cloak a multitude of evils. For example, it has been held that "the legal incidence of a tax falls upon that entity or person to whom the state under a reasonable interpretation of its entire taxing scheme untimately looks for satisfaction of the exaction." *United State v. State Tax Commission of the State of Mississippi,* 378 F.Supp. 558, 566 (S.D. Miss. 1974). It has also been held in a Washington test that the incidence of a tax "is its impact, effect, or imposition upon the person, property or transaction that bears the ultimate money burden." *P. Lorillard Co. v. City of Seattle,* 8 Wash. App. 510, 507 P.2d 1212, 1216 (1973).

In the case of *Railway Express Agency, Inc. v. Virginia,* 358 U.S. 434, 439, 79 S.Ct. 411, 415,3 L.Ed.2d 450 (1959), the Supreme Court used the term in connection with a Virginia franchise tax measured by gross receipts from transportation within the state—through the state or into or out of the state. It held that the tax was not violative of the Commerce Clause. This was designed to take the place of all property taxes levied against foreign corporations. The Supreme Court had to answer the question whether the tax was on personal property of the express company or on the privilege of doing business. The Court said that the statute undertook to tax the latter. In describing the contention of the appellant Express Company, the Court said:

> It readily admits that the latter agreements are "valuable contract rights" and contribute a principal element to the "going concern value" of its business in the Commonwealth. Subsuming that a valid tax levy might be levied on such intangibles, it argues, however, that the incidence of the tax is on appellant's privilege to carry on an exclusively interstate business in Virginia rather than on intangible property. Our sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege.

358 U.S. at 439, 79 S.Ct. at 415. It is believed that the court was there using "incidence" as meaning the burden of the tax.

Again, in *Polar Co. v. Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed. 2d 389 (1964), it was said:

> The incidence of the tax appears to be upon the activity of processing or bottling milk in a plant located within Florida, and not upon work performed on a federal enclave or upon the sale and delivery of milk occurring within the boundaries of federal property.

375 U.S. at 382, 84 S.Ct. at 390.

Thus, it was using "incidence" as that to which the tax was addressed. This was also the approach in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Again, in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963), Mr. Justice Clark in his dissenting opinion spoke of incidence as being "the moment that the product becomes a part of the mass of property within the State. It matters not what happens to the property subsequently. The tax attaches to the property in its form at that specific time." 373 U.S. at 79, 83 S.Ct. at 1209. See *also Arizona Public Service Co. v. Snead*, 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979), where it was used in relationship to the gross receipts tax credit. It was said that this was being shifted to the generating utility.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), a state

gross income tax had been applied to transportation of cars outside the state and into the state. The court held that the incidence of the tax was on the privilege of doing business and could be levied. The court there said that the tax looked only to the incidence of it and disregarded its practical effects.

What has been said plainly shows that incidence of the tax should not be the test in dealing with a conflict between a state and an Indian tribe. Blind adherence to the incidence test is designed to bring about an effect which would be out of harmony with the history, the terms of the organic laws, and the cases.

Finally, we have not been able to find a precedent for using this vague phrase in order to validate a state law imposing a tax on an Indian tribe. To do so constitutes the use of "magic words" similar to those described by Justice Clark in *Railway Express Agency, Inc. v. Virginia, supra. See* 358 U.S. 434 at 441, 79 S.Ct. 411, 416, 3 L.Ed.2d 450.

Based upon the fact that the majority opinion is at odds with the prior law, plus the fact that it is an invasion of Indian sovereignty, and is inconsistent with the underlying policies of the United States in regard to developing the independence of the tribes of Indians, the judgment should be reversed.

McKAY, Circuit Judge, dissenting, in which WILLIAM E. DOYLE, Circuit Judge, joins:

The Majority determines that a passage from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973) "leaves no discretion for any doctrine of preemption" in analyzing the "application of state laws on the Mescalero Reservation." Maj. op at 970. To reach that conclusion it necessarily must ignore that requirements of *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), decided the same day as *Jones*. *McClanahan* leaves no doubt that preemption analysis is the fundamental starting point for resolution of jurisdictional disputes between states and Indian tribes. 411 U.S. at 172, 93 S.Ct. at 1262. By refusing to undertake that necessarily complex, detailed analysis, this court abdicates the

duty imposed on it by the Supreme Court and reaches a result contrary to that which the mandated analysis would produce.

I.

The Mescalero Apache Tribe constructed a housing project for members of the Tribe and a resort complex to provide a source of revenue for tribal government activities on the reservation. The resort complex is essentially a government revenue measure much like utilities created by states and municipalities. In order to keep the bids down, the Tribe entered into construction contracts that obligate the Tribe to indemnify the contractors for any state gross receipt taxes which the State might levy on the contract. The Tribe has consistently taken the position that the State of New Mexico may not legally increase the Tribe's direct governmental costs by imposing a tax calculated on its contracts for tribal services.[1] The State has nonetheless levied its gross receipts and compensating tax[2] on monies received by the non-Indian contractors for work on the projects—a levy which must be paid by the Tribe if the State has authority to impose this tax.

The Tribe sought a declaration in federal district court that the State may not collect the tax. On one narrow subsidiary issue the Tribe prevailed: The contractor for the reservation housing project was held to be the Tribe's agent in purchasing building materials. The tax on the purchase of materials therefore fell upon the Tribe itself and was held to be invalid. *Mescalero Apache Tribe v. O'Cheskey,* 439 F. Supp. 1063, 1068—71 (D.N.M. 1977). The State has appealed that portion of the district court's decision. The trial court was correct in the resolution of the agency issue.

[1]No negative significance should be attached to the fact that the contracts were drawn and the funding arrangements made in an obvious attempt to avoid state taxation.

[2]N.M.Stat.Ann. §§ 72-16A-1 *et seq.* (Supp. 1975).

On the more fundamental issue— the application of the tax to the contractors' gross receipts for services to the Tribe—the district court held the tax valid. The court admitted there was "no question that the imposition of the tax will have an economic effect upon the Tribe," 439 F.Supp. at 1072, but believed the tax was only an "indirect burden" which would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 1072-73. The Tribe appeals from this ruling.

The federal government was heavily involved in the arrangements for the construction projects. For example, the Economic Development Administration, as the principal source of funds for the resort project, approved the selection of contractors and the individual contracts. Most of the remaining funds for the project came from a Bank of New Mexico Loan, ninety percent of which is guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*

The Tribe has passed its own gross receipts tax and licensing ordinances. At the time of this suit, the Tribe had not imposed its tax or its licensing requirements on any businesses. The Tribe's failure to levy the tax on the contractors here does not reflect any deference to a perceived higher state authority. The Tribe reasonably decided that, since the tax funds would ultimately come from tribal coffers, imposition of the tax would produce no net benefit to the Tribe.

On the basis of these facts, three overlapping theories are evident, each of which is sufficient to preclude state taxation. The first theory is that federal power has preempted state taxation on the Mescalero reservation. The second is that the legal incidence test is inapplicable to Indian taxation questions. Finally, the Tribe's own regulatory scheme preempts a state regulatory tax.

II.

In jurisdictional disputes between state governments and Indian tribes, we are required to determine

whether the applicable treaty and federal statutes, read against the "backdrop" of Indian sovereignty, preempt exercises of state power. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. at 172, 93 S.Ct. at 1262; *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148, 93 S.Ct. at 1270; *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690-91, 85 S.Ct. 1242,1245-1246, 14 L.Ed.2d 165 (1965). Under a standard of construction followed from the time of the Marshall Court, we must construe the applicable treaty and statutes liberally in order to further Indian interest. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174, 93 S.Ct. at 1263; *Squire V. Capoeman*, 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67, 50 S.Ct. 121, 122-123, 74 L.Ed. 478 (1930); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832).[3] In contrast to general preemption analysis, with Indian cases we presume that, absent clear congressional statement, federal law has preempted state jurisdiction. *See Bryan v. Itasca County*, 426 U.S. at 392-93, 96 S.Ct. at 2112-2113; D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 295-99 (1979). Because Congress has spoken so clearly in favor of federal preemption with respect to the Mescalero Apaches, however, it is apparent that there is federal preemption is this case even without the benefits of that presumption.

Our analysis begins with the applicable treaty. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. at 173-74, 93 S.Ct. at 1262-1263.[4] In Article 1 of that document, the Tribe submits itself "*exclusively*

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[3]The applicable treaty itself mandates "liberal construction. . .to the end that . . . the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Apaches, July 1, 1852, art. 11, 10 Stat. 980 (1852). It must be assumed that the federal courts are included in "the government of the United States."

[4]In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), decided the same day as *Mc-*

[to] the laws, jurisdiction, and government of the United States of America." Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852) (emphasis added). Further, the treaty provides that the *United States* shall "designate, settle, and adjust [the Tribe's] territorial boundaries, and pass and execute. . .such laws as may be deemed conducive to the prosperity and happiness of [the Mescalero Apaches]." *Id.*, art. 9, 10 Stat. 980. Despite these explicit statements of plenary federal power, the district court inexplicably and erroneously did not rely on the treaty language in its analysis.[5]

The importance of the treaty's exclusivity language cannot be overstated. It fundamentally distinguishes the instant case from prominent precedents in which federal preemption was not found.[6] For example, in

Clanahan, the Court did not analyze the Mescalero treaty. However, *Jones* dealt with state taxation of tribal proprietary activities on *off-reservation* lands, an issue fundamentally different from that of the instant case. Hence, the Court's rejection of "exclusive [federal] jurisdiction over the Tribe for all purposes," *id.* at 147, 93 S.Ct. at 1271, does not imply a rejection of exclusive on-reservation jurisdiction. *See id.* at 149, 93 S.Ct. at 1270.

[5]Without a textual analysis the majority in this case denigrates the importance of the treaty. *See* maj. op. at 971. If indeed the treaty purported to be "only" a treaty of peace and friendship, as the majority asserts, *id.*, it would still mean a great deal. In any case, what the treaty purports to be is a question requiring close textual analysis by this court.

The majority questions in passing the validity of the treaty. In so doing, the majority gives weight to a position that was not argued before this court by the State and necessarily relies on facts not found by the court below. The district court specifically refused to consider New Mexico's contention that the treaty was invalid because signed by improper representatives of the Mescalero Apaches. The court also declined to "determine whether the nature of the treaty somehow gives the . . .Tribe *fewer* rights than other treaties give to other Indian tribes." *Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, 1066 n.5 (D.N.M.1977) (emphasis added). The court's reluctance to reopen ancient ratification disputes is understandable, *see* F. Cohen, *Handbook of Federal Indian Law* 34 (1942), but its failure to study the treaty language and to compare that language with other treaties is not. *See*, 439 F. Supp. at 1073-74.

[6]No recent Supreme Court case construes a still vital treaty containing similarly powerful language. The treaty in *Puyallup*

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). the Court approved imposition of a state cigarette tax on reservation sales to non-Indians. The applicable treaty, however, contains no broad exclusivity language. See Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (1855).[7] Our decision in *Ute Indian Tribe v. State Tax Commission, 574 F.2d 1007 (10th Cir. 1978), cert. denied*, 439 U.S. 965, 99 S.Ct. 452, 58 L.Ed.2d 423

Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977), did give the Tribe "exclusive use" of certain land, but the Tribe had long before given up exclusive jurisdiction over the land. *Id.* at 174-75, 97 S.Ct. at 2622-2623.

[7] *Moe* also differs from this case because there (1) the district court found that it was "the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption," 425 U.S. at 481-82, 96 S.Ct. at 1645; (2) the burden on the Indian seller was "not, strictly speaking, a tax at all," *id.* at 483, 96 S.Ct. at 1646; and (3) no tax effects fell on the tribe per se and therefore tribal self-government was not implicated; individual salesmen were obligated to precollect the tax. *See also Fort Mojave Tribe v. County of San Bernardino*, 543 F 2d 12[illegible]3, 1255 n.2 (9th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977) (economic burden of tax unclear.)

Moe's rationale is also theoretically suspect. The Court accepted the district court's finding that the burden of the tax falls on the non-Indian consumer because "[t]hat finding necessarily follows from the Montana statute, which provides that the cigarette tax 'shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only.' " 425 U.S. at 482, 96 S.Ct. at 1645. Although there is legal authority for that finding, *see, e. g., United States v. Tax Comm'n*, 421 U.S. 599, 608, 95 S.Ct. 1872, 1878, 44 L.Ed.2d 404 (1975), it will not withstand the scrutiny of economic analysis. Unless the demand curve for a product is perfectly inelastic—so that any price fluctuation does not affect quantity demanded—an increase in price via a tax will result in lower quantities sold. An assumption that cigarette sales are impervious to price changes is most questionable. However the Indian seller acts to counteract the tax's effects—*e.g.*, by lowering his own prices—he is forced to absorb part of the burden. In only the most narrow terms can the burden on the seller not be considered a tax. *See* Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 Wash.L.Rev. 531, 537-40, 566-68 (1979); Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 Am.Ind.L.Rev. 1, 46-47 (1977).

(1978), is similarly distinguishable. The language of the Mescalero Apache treaty also strengthens and widens the import of cases such as *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), where federal preemption was narrowly found despite non-exclusive treaty language.[8] *See* 411 U.S. at 174, 93 S.Ct. at 1263.

The treaty is also important because it aids in the interpretation of other federal preempting statutes. For example, it removes from consideration any narrow reading of the Enabling Act for New Mexico, 36 Stat. 557 (1910). That Act, as a condition for admission to statehood, required New Mexico to disclaim

> all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and *under the absolute jurisdiction and control of the Congress of the United States;* . . . but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

[8]In *McClanahan*, the Court answers negatively "the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation." 411 U.S. at 168, 93 S.Ct. at 1260.

The analysis in the text should not suggest that the treaty in-

Id. at 558-59 (emphasis added).[9] To counter the apparent effects of this Act, the State of New Mexico points us to *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), in which the Supreme Court interpreted a similar state enabling act. Brief for the State of New Mexico at 8. The court there held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction," 369 U.S. at 68, 82 S.Ct. 567, and stated that the language effected a state disclaimer only of proprietary, and not governmental interests. *Id.* at 69, 82 S.Ct. at 567. However, the Court has since limited the effect of *Egan*. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court explained that *Egan* "came in the context of a decision concerning the fishing rights of *non-reservation* Indians. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." *Id.* at 176 n.15, 93 S.Ct. at 1264 n.15 (emphasis in original). This case, like *McClanahan*, involves attempted state interference on a reservation set aside for the use and control of Indians. Furthermore, in this case the treaty explicitly provides for exclusive jurisdiction in the federal government. Here "absolute" jurisdiction is, because of the treaty language, "exclusive" jurisdiction.

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terpreted in *McClanahan* provides the Navajo Nation with only narrow protection. Indeed, the treaty provides for exclusive use and occupancy of reservation lands by the Navajos. Furthermore, it excludes non-Navajos, except those authorized, from entering the reservation. Treaty with the Navajo Tribe, 15 Stat. 668 (1868). *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 174, 93 S.Ct. at 1263. Neverthless, in federal preemption analysis we look first for the explicit grants of federal jurisdiction. In that respect the Treaty with the Apaches is a far stronger treaty.

[9]The latter part of this passage was relied upon in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149-50, 93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114 (1973), in permitting taxation, not otherwise congressionally proscribed, of off-reservation Indian activities. We do not, of course, have a similar situation before us.

This interpretation of the Treaty with the Apaches has been accepted elsewhere. In a case involving the Mescalero Apaches, the New Mexico Supreme Court also viewed the *McClanahan* clarification of *Egan* as a refusal "to extend the concept of concurrent federal and state jurisdiction to cases which arise in areas set aside by treaty for the exclusive use and control of Indians." *Chino v. Chino*, 90 N.M. 203, 205, 561 P.2d 476, 478 (1977). The court would not countenance state jurisdiction over fee patent land, occupied by a non-Mescalero, within the boundaries of the reservation.[10]

Although the treaty and the enabling act alone are sufficient to create federal preemption, several other factors also mandate the conclusion that the state tax is precluded by federal preemption.[11] (1) The Mescalero Apache Constitution, federally approved pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476, gives the Tribal Council authority to regulate all business and industry on the reservation, including the power to issue licenses and assess taxes. Mescalero Apache Tribe Revised Const.

[10]The State of New Mexico argues that *Chino's* import is limited to its particular facts—a dispute between two Indians (one not a Mescalero Apache) over Indian lands. Brief for the State of New Mexico at 8. Given the quotation interpreting *McClanahan*, the court's rationale cannot be so limited. The State further argues that "[w]here . . . non-Indian corporations do work on a reservation, the Supreme Court of New Mexico has clearly indicated they are subject to tax." *Id.* (citing *Prince v. Board of Educ.*, 88 N.M. 548, 543 P.2d 1176 (1975)). The language of *Prince* is, without question, very broad. *See, e.g.*, 543 P.2d at 1181. However, the Navajo treaty involved in *Prince* did not give exclusive jurisdiction to the United States. Furthermore, the dictum of *Prince* dealt with state taxation of private property located on the reservation, but owned by non-Indian corporations. It did not deal with a gross receipts tax on funds provided by the Tribe and the federal government for services performed directly for the Tribe. Even if we were bound by *Prince*—and we are not—we would not have to repudiate that case in order to find federal preemption in this one.

[11]Although the district court found that Indian traders' licenses could not properly be issued to the contractors, 439 F.Supp. at 1067-68, that fact does not preclude a finding of preemption. *See*

art. 11 § 1(d), (s). (2) Under Public Law 280, the State of New Mexico "could have unilaterally assumed jurisdiction over . . . the . . . Reservation at any point during the 15 years between 1953 and 1968," *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 177 n.17, 93 S.Ct. at 1265 n.17, yet it did not do so. *see* Pub.L. 280, 67 Stat. 590 (1953). Since 1968, tribal consent for state assumption of jurisdiction has been required. 23 U.S.C. §§ 1321-22.

> [The] Act [requiring tribal consent] cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected . . . if the States were free to accomplish the same goal unilaterally by simple legislative enactment. . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, . . . the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

McClanahan v. Arizona State Tax Commission, 411 U.S. at 178-79, 93 S.Ct. at 1265.[12] *See also Kennerly v. District Court*, 400 U.S. 423, 424-30, 91 S.Ct. 480, 480-484, 27 L.Ed.2d 507 (1971). (3) The federal government, particularly the Economic Development Administration, was pervasively involved in the project. Even individual contracts were approved by the E.D.A.

The treaty and statutes discussed above, coupled with the "inherent powers of a limited sovereignty which has never been extinguished," F. Cohen, *Hand-*

McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 170 n.6, S.Ct. at 1261 n.6.

[12]Although *McClanahan* involved state income taxation of individual Indians, Public Law 280 deals with state jurisdiction over acts and events occurring on Indian reservations, not merely with personal jurisdiction over individuals. Even if New Mexico had asserted jurisdiction, that jurisdiction would no extend to taxation of reservation Indians or Indian property. *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

book of Federal Indian Law 122 (1942) (emphasis deleted), *quoted in United States v. Wheeler,* 435 U.S. 313, 322, 98 S.Ct. 1079, 1085, 55 L.Ed.2d 303 (1978),[13] protect the territorial integrity of the Mescalero Apache reservation. Protection of territorial integrity has become increasingly important because Indian self-government and self-determination have become the stated goals of federal Indian law. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 62, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978); *Fisher v. District Court,* 424 U.S. 382, 391, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976); *Morton v. Mancari,* 417 U.S. 535, 551-55, 94 S.Ct. 2474, 2483-2485, 48 L.Ed.2d 290 (1974). Congress has "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 Harv.C.R.-C.L.L.Rev. 357,

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[13]The Supreme Court continues to recognize that Indian tribes are possessed of attributes of sovereignty. *See, e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56, 98 S.Ct. 1670, 1675-1676, 56 L.Ed.2d 106 (1978); *United States v. Wheeler,* 435 U.S. 313, 322-28, 98 S.Ct. 1079, 1085-1089, 55 L.Ed.2d 303 (1978); *Oliphant v. Suquamish Indian Tribe,* 435, U.S. 191, 208, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978); *United States v. Antelope,* 430 U.S. 641, 646, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977); *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

The State of New Mexico apparently believes that the tribal sovereignty and federal preemption doctrines are mutually exclusive. *See* Brief for the State of New Mexico at 9-10. Certainly from a purely theoretical standpoint the two sources of tribal power do not easily coexist; an increase in federal power over the Tribe must result in a diminution of sovereignty as traditionally understood. However, in the complex body of federal Indian law the two doctrines reinforce one another. Both doctrines have arisen as limitations on state jurisdiction. It is in this consistent sense that the Supreme Court's view of sovereignty—as a backdrop against which to view treaties and statutes—should be understood. *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 296-97 (1979); Comment, *The Indian Battle for Self-Determination,* 58 Cal.L.Rev. 445, 451-52 (1970).

393-95 (1978). The principle of self-determination may be said to *require* protection of territoriality. *See id.* at 390 & 390 n.154. *See also Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 at 542-543 (10th Cir. 1980).

In spite of changing notions about tribal sovereignty, "it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend." *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 170, 93, S.Ct. at 1261. *See United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). Indeed, the Supreme Court views state taxation of Indian lands or income as a "special area," with a still diminished justification for breaching reservation boundaries. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). *See Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). Since the Mescalero Apache Tribe's reservation is afforded unusually strong protection, the State's imposition of its taxes there is especially disfavored.

Since the Tribe's insulation from state taxation is not based primarily on principles of retained sovereignty, we need not determine whether aspects of sovereignty have been surrendered "by implication as a necessary result of [the Tribe's] dependent status." *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978). The language of *Wheeler* and *Oliphant* "should not be mistaken for a new test that replaces the examination of relevant treaties and statutes." Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L.Rev. 89, 110 (1978). In any case, there is no reason here to imply divestiture: "In most respects the *Oliphant Court's rationale does not apply to noncriminal cases.*" *Collins, Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 508 (1979).

Because the applicable treaty and federal statutes,

read against the backdrop of inherent tribal sovereignty, preempt state jurisdiction in this case, the State of New Mexico may not tax the receipts of non-Indian contractors for work done for the Tribe on the Mescalero Apache reservation.

III.

This case may also be resolved on the ground that the economic burden of this tax falls, without question, on the Tribe itself. Regardless of any dispute we might have about the level of federal preemption, there is manifestly no state power to tax Mescalero Apache reservation Indians directly. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

The burden falls on the Tribe because the Tribe is obligated, by contract, to indemnify the contractors for any state gross receipt taxes assessed on the proceeds of these contracts. *See Mescalero Apache Tribe v. O'Cheskey*, 439 F.Supp. 1063, 1072 (D.N.M. 1977). The State argues that the Tribe could have secured funds for the taxes from the federal government. Grants from the Economic Development Administration typically include all allocations to cover state and local taxes. However, it is not merely the election of the Tribe which determines where the ultimate burden falls. We cannot assume that the Tribe has unlimited access to the federal treasury. Indeed, we should expect the Tribe to minimize the costs of any particular project so as to maximize chances for further grants. The E.D.A. grants are the Tribe's resources, not the State's. The State may not insist that the Tribe secure extra funds in order to be held liable for state taxes.

The district court held that the legal incidence test controls and, because the legal incidence of the tax falls on the contractors rather than the Tribe, the tax is valid. 439 F.Supp. at 1072. However, the legal incidence test, born to resolve federal-state conflicts, does not apply here.

The legal incidence test was developed in cases where the ultimate economic burden of a state tax on

contractors fell on the federal government. *See* L. Tribe, *American Constitutional Law* 396 (1978). Mechanical application of the legal incidence test is permissible in such circumstances because no significant interference with federal activities results. *See United States v. New Mexico,* 581, F.2d 803, 806 (10th Cir. 1978).[14] Measured against the vast resources of the federal treasury, the actual burdens of state taxation are insignificant. In contrast, the treasuries of nearly all Indian tribes are small: "On virtually every scale of measurement—employment, income, education, health—the condition of Indian people ranks at the bottom." President's Message to Congress Transmitting Recommendations for Indian Policy, H.R.Doc. No. 363, 91st Cong., 2d Sess. 1 (1970). *See also* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 9 (1979). To ignore the actual effects of state taxation on Indian tribes is to ignore the lessons of *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

It is because of the broad tax base of the federal government that tax exemptions to federal contractors are unjustified. Taxation of the contractors causes no "actual interfering or destructive effects upon the . . . government." *Oklahoma Tax Commission v. Texas Co.,* 336 U.S. 342, 364, 69 S.Ct. 561, 573, 93 L.Ed. 721 (1949). The repudiation of the federal instrumentality doctrine in *Texas Co.* did not also repudiate *McCulloch's* protection of those constitutional units whose economic stability is less clearly evident. Indeed, the Supreme Court has recently reiterated the concern that economically more powerful units not overwhelm the less secure. *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L. Ed.2d 245 (1976). *See Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 116-17, 74 S.Ct. 403, 407-408, 98 L. Ed. 546 (1954); *Note, Federal Tax Immunity and the Legal Incidence of the Maine Sales Tax,* 29 Maine

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[14] In *Unites States v. New Mexico,* 581 F.2d 803 (10th Cir. 1978), we applied the formalistic legal incidence test and upheld the application of the New Mexico gross receipts tax to federal contractors.

L. Rev. 149, 153-54 (1977). Our own concern for the solvency of tribes, whose "status [is] higher than that of states," *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), dictates that the legal incidence test not be applied in Indian cases.[15]

We are not without suggestions from the Supreme Court that the legal incidence test is inappropriate when Indian tribes are involved. In *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949), the Court permitted imposition of a tax on non-Indian lessees operating on Indian lands. The Court specifically noted, however, that there was "no possibility that ultimate liability for the taxes may fall upon the [Indian] owner of the land." *Id.* at 353, 69 S.Ct. at 567. *See* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U.Pa. L.Rev. 491, 509 (1975). In contrast, we have before us a finding that "[t]here is no question that the imposition of the tax will have an economic effect upon the Tribe" *Mescalero Apache Tribe v. O'Cheskey*, 439 F.Supp. 1063, 1072 (D.N.M. 1977).[16]

If we look to actual incidence, this case falls clearly under the *McClanahan* rule: state taxation of reservation Indians for on-reservation activities is impermissible absent express congressional authority. 411 U.S. at 171, 93 S.Ct. at 1261. Because of the

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[15]"A wholly different approach is taken concerning state taxation in Indian law. The cases do not revolve around whether the state tax is 'nondiscriminatory' or where the 'legal incidence' falls . . . ." D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 298 (1979).

[16]Even were we to look for the legal incidence of this tax, we 96 S.Ct. 1530, 47 L.Ed.2d 780 (1976); *United States v. New Mexico, 581 F.2d 803, 806 (10th Cir. 1978). In addition, with the tax's validity at issue, at least one New Mexico court has, in the alternative, looked beyond the formal legal incidence to the "real taxpayer" in order to uphold the tax. First Nat'l Bank v. Commissioner of Revenue*, 80 N.M. 699, 705, 460 P.2d 64, 70 (Ct. App.), *cert. denied*, 80 N.M. 707, 460 P.2d 72 (1969), *appeal dismissed*, 397 U.S. 661, 90 S.Ct. 1407, 25 L.Ed.2d 643 (1970). The district court citied *First Nat'l Bank* for its alternative and contrary holding. 439 F.Supp. at 1072 n.23.

Mescalero Apache treaty and the incidence of the tax on the Tribe itself (thereby implicating self-government), this case falls a *fortiori* within the *McClanahan* rationale.

IV.

The proper result in this case is mandated by yet another rationale. Regardless of the level of federal preemption, the Tribe's own regulatory powers may preempt exercises of state regulation.

Limiting state jurisdiction within tribal territory recognizes the "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959), *quoted in McClanahan v. Arizona State Tax Commission*, 411 U.S. at 171-72, 93 S.Ct. at 1262. Indigenous Indian institutions are permitted to flourish, a goal recognized by the New Mexico Supreme Court: "For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny Indians the opportunity of developing their own systems." *Chino v. Chino*, 90 N.M. 203, 206, 561 P.2d 476, 479 (1977). *See Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959), *quoted in McClanahan v. Arizona State Tax Commission*, 411 U.S. at 171-72, 93 S.Ct. at 1262. Indigenous Indian institutions are permitted to flourish, a goal recognized by the New Mexico Supreme Court: "For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny Indians the opportunity of developing their own systems." *Chino v. Chino*, 90 N.M. 203, 206, 561 P.2d 476, 479 (1977). *See Williams v. Lee*, 358 U.S. at 223, 79 S.Ct. at 272.

Among the areas of self-government to be developed is the regulation of business activities on the reservation. As an element of sovereignty, the Tribe retains the "power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." *Powers of Indian Tribes*, 55 Interior Dec. 14, 50

(1934).[17] *See* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash.L.Rev. 479, 511-13 (1979). Regulatory taxation of tribal nonmembers, "so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions," is also clearly a retained power. 55 Interior Dec. at 46. Furthermore, under the tribal constitution, approved pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476, the Tribal Council is given authority to regulate all business and industry on the reservation. The Tribe has authority to enact and enforce ordinances for the "assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation." Mescalero Apache Tribe Revised Const. art. 11, § 1(s).

The Tribe's power to regulate those doing business on its reservation directly conflicts with the professed purpose of the New Mexico gross receipts tax: to tax the privilege of engaging in business in New Mexico. N.M.Stat.Ann. § 72-16A-2(Supp.1975). The State has no cognizable interest in granting or denying the privilege of engaging in business within the reservation. Contradictory regulatory schemes would stifle any hope for the Tribe's economic development. Whether a primarily revenue-raising state tax is preempted by the imposition of a tribal revenue-raising tax is a separate issue, not fully resolved.[18] However, tribal preemption of state regulatory schemes has clear support. *Cf. Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685, 690-91, 85 S.Ct. 1242, 1245-1246, 14 L.Ed.2d 165 (1965). *See*

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[17]This Interior Department decision was cited with approval, although for other propositions, in *United States v. Wheeler,* 435 U.S. 313, 328, 328 n. 27, 98 S.Ct. 1079, 1088, 1089 n. 27, 55 L.Ed.2d 303 (1978).

[18]*See Confederated Tribes of the Colville Indian Reser. v. Washington,* 446 F. Supp. 1339 (E.D.Wash.1978) (three-judge court), *prob. juris. noted,* 440 U.S. 905, 99 S.Ct. 1210, 59 L.Ed.2d 452 (1979). *See also* Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique,* 54 Wash.L.Rev. 531, 570-72 (1979); Goldberg, *A Dynamic*

also United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). Indeed, the regulation by the Tribe "relieve[s] [the State] of all burdens for carrying on those same responsibilities." *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. at 690, 85 S.Ct. at 1245. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. at 170 n.6, 93 S.Ct. at 1261 n.6.

V.

Imposition of the gross receipts tax on the proceeds of contracts between contractors and the Mescalero Apache tribal government is unsupported in law. Under the doctrine of federal preemption—as supplemented by tribal preemption doctrine and the inapplicability of the legal incidence test—we should reverse that portion of the district court's decision.

OPINION ON REHEARING

In the *Central Machinery* tractor sale case, *Central Machinery Co. v. Arizona State Tax Comm.*, _____ *U.S.* _____, *100 S.Ct. 2592, 65 L.Ed.2d* _____, *the Court dealt only with a sale of "goods" on a reservation which was the only significant aspect of the transaction. The majority quoted from 25 U.S.C. § 263, "introduction of goods" into the country belonging to any Indian Tribe; § 264, making it an offense to introduce goods or to trade on a reservation without a license; and 25 C.F.R. § 25.9(b), "itinerant peddlers." The Court said: "One of the fundamental purposes of these statutes and regulations—to protect Indians from becoming victims of fraud in dealings with persons selling goods—. . . ." The tax in Central Machinery* was exactly the same as considered in *War-*

View of Tribal Jurisdiction to Tax Non-Indians, 40 Law & Contemp.Prob. 166, 186-88 (1976); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U.Pa.L.Rev. 491 (1975); Note, *Tribal Preemption*, 54 Wash.L.Rev. 633 (1979). There is no question that "Indian self-government . . . includes the power of an Indian tribe . . . to levy taxes." F. Cohen, *Handbook of Federal Indian Law* 122 (1942).

ren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165, and the Court concluded that the only difference between this case and *Warren Trading* was that the seller here had no license and no fixed business on the reservation.

In our view, we considered *Warren Trading* fully and the sale of "things" case was not considered to be applicable to our problem. The court in *Central Machinery* stated:

> "The Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader."

The Court also there said:

> "Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax."

In our previous consideration of *Warren Trading* in the case before us we did not conclude that the matter was controlled by the Indian trader statutes. Thus it would appear that *Central Machinery* adds no new elements or factors not already considered.

White Mountain Apache Tribe v. Robert M. Bracker, _____ U.S. _____, 100 S.Ct. 2578, 65 L.Ed.2d _____, concerned Arizona's attempt to levy a fuel tax and a motor vehicle tax on the non-Indian entity, Pinetop, which was trucking logs on the reservation to the Indian sawmill. The decision was 6 to 3.

Of the work of Pinetop, Justice Powell in concurring said that Pinetop operated solely and continuously upon an Indian reservation and:

> "Pinetop's daily operations are controlled by a comprehensive regulatory scheme. . . .Federal officials direct Pinetop's hauling operations down to such details as choice of equipment, selection of routes, speeds of travel, and dimensions of the loads. . .Pinetop does all of the hauling at issue in this case over roads constructed, maintained, and regulated by the . . . Tribe and the Bureau of Indian Affairs."

The Court also pointed out that the hauling contrac-

tors with the Indians were required to repair existing roads and to build new ones, not the State of Arizona, and this is very expensive for the contractors. Pinetop's business in Arizona was conducted solely on the reservation.

The Court in *White Mountain* said of the preemption argument and the burden:

> "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority had exceeded the permissible limits.' "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." ' *United States v. Mazurie,* supra, 419 U.S. [544,] at 558 [, 95 S.Ct. 710, at 718, 42 L.Ed.2d 706] quoting *Williams v. Lee,* 358 U.S. 217, 223 [, 79 S.Ct. 269, 272, 3 L.Ed.2d 251] (1959). Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe. Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose. . .."

And in a footnote:

> "Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is preempted, as *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 [, 96 S.Ct. 1634, 48 L.Ed.2d 96] (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm'n,* supra, leaves no room for the additional burdens sought to be imposed by state law."

Under the footnote the burden argument is the same

as preemption.

With the reexamination of our previous opinion it appears that the elements in both cited cases were considered and evaluated. The Motion for Rehearing is denied.

McKAY, circuit Judge, Dissenting:

In my view *White Mountain Apache Tribe v. Bracker,* _____ U.S. _____, 100 S.Ct. 2578, 65 L.Ed2d _____ (1980), and *Central Machinery Co. v. Arizona State Tax Commission,* _____ U.S. _____, 100 S.Ct. 2592, 65 L.Ed2d _____(1980), emphasize the correctness of the position maintained in my dissent and that of Judge Doyle. Therefore I do not concur in the memorandum denying the petition for rehearing, and I would grant rehearing.

MESCALERO APACHE TRIBE
Plaintiff,
v.
Fred L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico and his successors in office, the Bureau of Revenue of the State of New Mexico, and the State of New Mexico, Defendants.

Civ. No. 76-171-B.

United States District Court,
D. New Mexico

Sept. 30, 1977.

As Amended Oct. 19, 1977.

MEMORANDUM OPINION

BRATTON, District Judge.

This action is another in a series of disputes between the Mescalero Apache Tribe [hereinafter the Tribe] and the State of New Mexico [hereinafter the state], and it, as did its predecessors, involves efforts by the state to assert a right that the Tribe denies exists. In this action, the right at issue is whether the state can levy its gross receipts and compensating tax on monies received by certain contractors for their work upon the Tribe's Inn of the Mountain Gods resort complex, a tribal housing project, and a recreation area and campground. All projects were constructed on the Mescalero Reservation, and all the contractors involved are non-Indian. Most of the contractors involved were issued Indian traders' licenses when they undertook to perform the construction services for which the state is attempting to tax them. Some of the contractors are New Mexico companies, and some are from out-of-state. All of the work performed was for the Tribe or an agency of the Tribe, and the Tribe entered into an indemnity agreement with the contractors providing that it would reimburse them for any gross receipts

tax they were required to pay to the state. The contractors have had assessed against them New Mexico gross receipts and compensating taxes, and the Tribe has been denied the opportunity to participate in the administrative hearings before the state's Bureau of Revenue relating to the tax assessments levied against one contractor.

[1] It should first be noted that the New Mexico Enabling Act [1] and the state's constitution [2] contain a disclaimer of state jurisdiction and control over Indian lands, and that no state jurisdiction of any kind has been assumed pursuant to *25 U.S.C.A. § 1322.* [3] Indeed, the state concedes that it cannot tax reservations lands or impose an income or gross receipts tax upon Indian income derived from work performed on a reservation. The state's contention is that it can tax non-Indians who perform construction services on a reservation for their receipts derived from such work.[4] The state also contends that the issuance of trader's licenses, as discussed *infra,* was beyond the authority of the defendant officials in the Department of Interior.

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[1] *36 Stat. 557* (1910).

[2] N.M. Const. art. 21, § 2.

[3] *25 U.S.C.A. § 1322* provides in pertinent part:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

[4] *N.M.Stat.Ann. §§ 72-16A-2, 72-16A-3 K*(Repl.1974) (Supp.1975).

[2] It should also be noted that the Mescalero Apache Tribe has had a treaty[5] with the United States since 1852 and a reservation since 1873. Its present reservation boundary lines were finalized in 1917 by Executive Order.

The Tribe has a constitutional form of government,[6] approved by the Secretary of the Interior, and consisting of a president who is chief executive, a legislature, which is the tribal council, and a judiciary, which is the tribal court. Under its constitution, the Tribe may regulate and control all business conducted on the reservation. It may enact ordinances for this purpose, including licensing provisions and tax assessments. The Tribe has, in fact, passed licensing and taxing ordinances, but they have not yet been applied to anyone doing any sort of business on the reservation, including the contractors involved in the subject matter of this action.

It is the Tribe's position that there are several reasons why there can be no state taxation under the circumstances of this case. First, it is asserted that such

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[5]The treaty provides that the Tribe shall be exclusively under the laws, jurisdiction, and government of the United States. *10 Stat. 979.*

Because the plaintiff relies on its treaty with the United States to prove that it is exclusively under federal jurisdiction, an effort has been made by the state in the present action to challenge the validity of the treaty. It is not the Court's function to undertake to consider the state's contentions with regard to whether the treaty was signed by proper representatives of the Mescalero Apaches. *United States v. New York Indians,* 173 U.S. 464, 469-70, 19 S.Ct. 1487, 43 L.Ed. 769 (1899); *see generally Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *Taylor v. United States,* 44 F.2d 531 (9th Cir. 1930); *United States v. Bridleman,* 7 F. 894 (D.Or.1881). Nor will the Court determine whether the nature of the treaty somehow gives the Mescalero Apache Tribe fewer rights than other treaties give to other Indian tribes. The Mescalero Apache Tribe is federally recognized, has been federally given a reservation, and is federally protected where appropriate.

[6]The Tribe's constitution was adopted pursuant to the Indian Reorganization Act, *25 U.S.C.A. § 476.*

taxation interferes with tribal self-government, since the legal and economic burden of the taxes is upon the Tribe, and since the Tribe itself has the power to and has enacted taxing ordinances covering those persons doing business on the reservation. It asserts that the state's tax does not extend to a situation where the state is unable to grant the privilege for which the tax is imposed, i.e., the privilege of doing business on the reservation can be granted only by the Tribe. It further claims that federal preemption has precluded the state from levying these taxes. Federal preemption is alleged to arise from the Tribe's own ordinances on the subject, as approved by the Secretary of the Interior; from the New Mexico EnablingAct, which exempts Indian land from state taxation and thus tangible property attached to that land; from the federal statutes and regulations relating to Indian trading licenses; from its 1852 treaty, as discussed note 5, *supra;* and the authority given Congress by the United States Constitution, art. 1, § 8, cl. 3, to regulate commerce with the Indian tribes. It is also contended that the state is violating its own statute which provides for a deduction for the sale of tangible personal property to the governing body of an Indian tribe,[7] and that the state may not impose its taxes within a reservation when it provides little or no services within that reservation. Finally, the Tribe asserts with regard to the contractor on the housing project that an agency relationship between it and the contractor precludes state taxation, inasmuch as such purchases as were there involved were made by the Tribe.

I.

[3] The first issue to be decided is whether the Indian traders' licenses were properly issued to the contractors engaged in the work on the resort complex and the housing project. If the licenses were proper under the circumstances, the matter is at an end, for the relevant federal statutes and regulations leave no room for a state to impose additional burdens upon

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[7] *N.M.Stat.Ann. § 72-16A-14.9* (Repl.1974) (Supp.1975).

such traders. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed. 2d. 165 (1965).

There are marked differences between the nature of the activities undertaken by the contractors in this case and the kind of activities the federal licensing statutes and regulations cover.

25 U.S.C.A. §§ 261-64 provide for the appointment of traders by the Commissioner of Indian Affairs, give the Commissioner the power to make rules and regulations governing such trade, and specify what goods may be sold to the Indians and what price may be charged for such goods. The regulations promulgated pursuant to Section 261 cover in detail the conditions of such trade, specifying, for example, that no white persons shall be employed as a *clerk* by any Indian trader, unless authorized by the Commissioner;[8] that the *store* of an unlicensed trader or a trader whose license has expired may be closed;[9] that the business of a licensed trader must be managed by the bonded principal, *who must habitually reside upon the reservation*;[10] and that the traders must submit, among other things, the *retail price* of articles sold by them to the superintendent when requested to do so, so that he may determine if the prices are fair and reasonable.[11]

The evidence shows that contractors in the present case entered into contracts with the Tribe to do or build specific things. One contractor did, for example, substantial earth moving. Another built a hotel. Yet another built a golf course. None of the contractors had a permanent business location on the reservation, and they and their employees departed the reservation at the close of each working day. The contractors' regular employees carried out performance of the contracts. At least one contractor asked his suppliers to

[8] *25 C.F.R. § 251.3*

[9] *25 C.F.R. § 251.13.*

[10] *25 C.F.R. § 251.14.*

[11] *25 C.F.R. § 251.22.*

obtain Indian traders' licenses, which they did. However, they did not come on the reservation, except in some instances where a supplier made deliveries to the contractor on the reservation.

Further, all the negotiations involving the projects and the ultimate contracting for their performance were participated in by the tribal officials, their counsel, Bureau of Indian Affairs officials, the contractors, and at least some of their counsel. The whole matter, the evidence shows, was conducted by experienced, knowledgeable people on a highly sophisticated level. It was hardly a sitution such as the federal laws and regulations were designed to cover, i.e., one where the Indian could be at the mercy of the white man in the absence of federal protection.[12]

The Superintendent of the Mescalero Agency testified that the licenses were a means to ascertain who had permission to come onto the reservation to keep track of what firms would actually be coming on the reservation to work. At a pre-construction meeting the contractors were told by persons representing tribal interests that the principal reason for requiring the traders' licenses was to avoid state tax liability. The former does not bring the licensing here done within the scope of the federal law and regulations, and the latter does not remove it therefrom. What is determinative of the issue is the nature of the work done, the circumstances surrounding its performance, and the persons by whom it was done. Other than to issue traders' licenses to the contracting firms, there was no effort to impose the other requirements of the federal laws and regulations. Nor is there any evidence that it was ever intended that there be, no doubt because they simply did not cover the situation.

[4] The action of the Secretary, performed by his delegate the Superintendent of the Mescalero Agency, while entitled to great weight, is subject to judicial review.[13] It is concluded that the provisions of *25*

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[12] *See generally Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *United States v. Douglas*, 190 F. 482 (8th Cir. 1911); U.S. Dept. of the Interior, Federal Indian Law, 348-51 (1958).

[13] *Rockbridge v. Lincoln*, 449 F.2d 567, at 572.

U.S.C.A. §§ 261-64 and *25 C.F.R. §§ 251.1-26* were not intended to cover the commercial transactions here involved, and the Superintendent's decision to issue the licenses to the projects' contractors was beyond his authority under them.

II.

The question of whether the contractors are otherwise exempt from the state's gross receipts and compensating tax remains. In resolving this issue, the exemptions claimed for the contractors involved in the resort complex and the campground differ from that of the contractor invovled in the housing project, for the Tribe has asserted that the latter was its agent.

The complicated circumstances surrounding the housing project on the reservation resulted from the need to conform to the requirements of Section 23 of the United States Housing Act of 1937, as amended.[14] Under the act, there must be an owner separate from the local housing authority which will administer, for example, tenant eligibility and approval of dwelling units.

Thus a variety of documents were needed to undertake the project. Most of them were executed simultaneously with the closing. First, the Tribe leased 100 parcels of land to its agency, the Mescalero Apache Tribe Housing Authority [hereinafter Housing Authority]. The Housing Authority then assigned its lease to the 100 parcels to a California firm named OGO, Incorporated, which planned the project and arranged financing. OGO became the owner for purposes of conforming to the Housing Act's requirements. The Housing Authority and OGO also entered into an agreement to enter into a lease whereby the Housing Authority would lease the houses to be built from OGO, and OGO and the Housing Authority also entered into a lease agreement of the units.

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[14] *42 U.S.C.A. § 142lb.*

Shortly before, OGO had entered into a contract with Quiller Construction Company [hereinafter Quiller], another California firm, to built the 100 houses.

OGO, its contractors, and the Housing Authority then entered into a contract, referred to as "Addendum No. 6,"[15] covering the scope of the work and providing for a procedure designed to utilize the Tribe's tax-exempt status to avoid payment of state taxes by the contractor, his suppliers, and his subcontractors. Tax exempt authorization documents were to be issued to all, and materials were to be billed directly to and paid

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[15] Item 86 of "Addendum No. 6" provides in pertinent part:

A. The [Mescalero Apache Tribe] has been granted certain exemptions by governmental authority from sales taxes; therefore, it will be required that contract procedures be conducted in a manner to reflect this sales tax credit. Bids which include any items as given in the tax credit materials list herein, must have materials purchase and taxable operation costs segregated from all other costs upon which respective bid is basis (sic). The amounts so segregated shall consist of a separate sum, representing the costs to which a tax is applicable, given in dollars and cents, and shown as a percentage of this sum, the applicable tax which would apply should the tax exempt status of MAT not prevail. The aggregate dollars and cents amounts thus resulting (material taxable sums plus the computed tax sums) shall be a part of, and will be deemed in all contract matters and negotiations to so be included in, the lump sum bid proposal total.

B. Subsequent to the execution of a work contract, in a manner yet to be finalized, a purchase order or equivalent document will be issued bearing the necessary tax exempt authorization, at Contractor's request and to his designated supplier, together with instructions that materials of this category shall be billed direct to, and will be paid by, the MAT Housing Authority directly to the supplier upon evidence of material delivery to Contractor, transport entity or equivalent point of discharge of supplier responsibility.

C. Supplier billings must show a total amount consisting of a sum for taxable material purchase and the correct legal sum, for applicable taxes which would apply to the purchase in a non-exempt situation, each in dollars and cents. The amount which will be paid by the MAT Housing Authority will be the material purchase sum. The amount to be debited (deducted from) the Contractor's amount will be the supplier's total amount as defined above. All materials of the tax credit list used on the project shall be so purchased.

Contractor's accounts will be debited only for the aggregate

for by the Tribe.

Financing was provided by the First National Bank of Albuquerque, which looked for repayment to the proceeds from the sale of tax-exempt bonds issued by the Housing Authority and ultimately sold by a New York brokerage firm, with the bank acting as trustee in the matter. Both interest and principal on the bonds were to be furnished by the United States through the use of annual contributions paid by the Department of Housing and Urban Development pursuant to a contract between the United States of America and the Housing Authority. The bonds were not a debt of either the Tribe or the Housing Authority.

OGO relinquished its leasehold interest in the project to the Housing Authority by quitclaim deed in 1973. OGO charged no fee for its services in connection with the project. The project had been undertaken with a donative intent, and the surplus money remaining from the bond issue over and above the cost of the job was left with the Housing Authority.

The state's tax act makes construction activities a service, the gross receipts from which are taxable

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total amounts of the supplier's billings as defined herein, regardless of the relation these amounts bear, above or below, to the amounts given in the Contractor's bid proposal segregation. Accounting records will be maintained by the MAT Housing Authority for each Contractor account to keep current proper account balances. Reconciliation of these accounts with progress payments accounts will be made by the MAT Housing Authority. The Contractor may request duplicate billings from his suppliers as his record needs require.

D. It is hereby expressly stated and agreed upon that the procedurs herein given are to facilitate accounting of the tax exempt relief to be granted the MAT only, and no other responsibility shall accrue to the MAT Housing Authority beyond those stated herein. Responsibility for correctness of quantity, delivery and conditions of material reaching the Contractor, unloading, storage, protection at the site, installation and all other foreseen or unforeseen hazards peculiar to the construction industry or this project in particular, and including all specifications and other contract documents, these shall prevail and be unencumbered by the provisions of this document.

E. *TAX CREDIT MATERIALS.* Owner reserves the right to add additional items, refer to specification sections for section

under the act.[16] It also makes all tangible personal property involved in such activities part of such service.[17] If the Tribe's claim is proper that Quiller was its agent for the purchase of materials used in the housing project, then the second provision could have no possible application to Quiller, for the act provides for a deduction from gross receipts for sales of tangible personal property to an Indian tribe.[18]

OGO, as owner, and Quiller, as contractor, pointing to the fact that under that contract Quiller was to furnish all labor and materials for approximately $1.9 million; that Quiller did so and was paid the contract price; that it ordered all materials; and that it bore the risk of loss for materials at the job site until they became a part of the houses. It also points out that Quiller received payments under its contract for materials and that it treated these payments as gross receipts on its books and tax returns. The State also asserts that "Addendum No. 6" was not followed. From this, the state concludes that Quiller was not the Tribe's agent.

[5] The state's position is too technical and restrictive. While it is true that a certain laxity prevailed with regard to complete observance of all the purchasing requirements provided for under Item 86 of "Addendum No. 6,"[19] many of them were followed. It is a fact that the Tribe was billed for all materials and that it paid all such bills. The fact that Quiller drew the money for this from the bank and paid it over to the Tribe be-

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and resulting contract under which purchasing or installation, or both, occur. Delivery costs are included in the specifications with furnishing (purchasing). Receipt, storage at the site and protection is included with installation.

[List of materials omitted.]

[16] *N.M.Stat.Ann.* §§ *72-16A-3 F, K* (Repl.1974) (Supp.1975).

[17] *N.M.Stat.Ann.* § *72-16A-3 K* (Repl.1974) (Supp.1975).

[18] *N.M.Stat.Ann.* § *72-16A-14.9* (Repl.1974) (Supp.1975).

[19] *See p.* 1069 and note 15 *supra.*

fore the bills were paid does not change this. Further, the two documents must be considered together, for Quiller was bound by both with regard to its participation in the project. The fact that the word "agent" was not used in either contract or by Quiller when it informed suppliers that the Tribe was to be billed for all materials is not important, if, in fact, an agency did exist. Where, as here, the contractor had the authority to order materials and to pledge the credit of the Tribe for the price of such materials, the Tribe was the disclosed purchaser, with no liability for the price accruing to the contractor. *Kern-Limerick, Inc. et al. v. Scurlock,* 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed.2d 546 (1954).

Finally, it should be noted that the state's position overlooks the totality of the circumstances surrounding the housing project. The various leases, the contracts, and the Housing Authoirty were designed to qualify under federal law for federal monies. It would be closing one's eyes to reality to ignore this. The houses were being built for the Tribe as de jure housing authority and as de facto owner. Once the project was financed and underway, OGO was nothing more, as OGO's president put it in his deposition, than "an interested watcher." Quiller was actually working for the Tribe and responsible to it. Quiller personnel knew that the Tribe intended that the company be the Tribe's agent for the purchase of materials. That the Tribe's motive for making Quiller its agent was to avoid the state's gross receipts tax is irrelevant. *See* 347 U.S. at 122, 74 S.Ct. 403.

[6] Accordingly, no state gross receipts tax may validly be imposed on Quiller Construction Company for the purchase of materials used in the Mescalero Reservation housing project. As concluded below, it is taxable for monies received in connection with its services on the project.

III.

The last question requiring resolution is whether the contractors who worked on the Inn of the Mountain Gods resort complex and the campground are subject to

assessment[20] pursuant to the state's gross receipts tax. It has been agreed that the legal and factual issues raised in the assessments against the two out-of-state contractors, Western Landscape and Ramey, are identical to those raised with regard to the remaining out-of-state contractors and that the legal and factual issues raised in the assessment against the New Mexico firm, Burn Construction, are identical to those involved in the assessments against the remaining in-state contractors. These three contractors worked on the Inn of the Mountain Gods resort complex. It has further been agreed that the Court's decision regarding the three contractors named above shall be deemed controlling and shall be res judicata and collateral estoppel for all parties and the contractors named in the complaint and in the stipulation entered into between the parties.

The resort complex built by these contractors on the Mescalero Reservation consists of a hotel, lake, golf course, and tennis facilities. It was built to generate income for the Tribe that would offset the decline in income from lumbering enterprises. So far, the complex has cost at least $20,000,000.00, and another three or four million dollars is currently being spent for additional facilities. The project has been funded primarily by the Economic Development Administration [hereinafter E.D.A.] of the United States Department of Commerce. One loan of $6,000,000.00 was obtained from the Bank of New Mexico. Ninety percent of this loan is guaranteed by the Secretary of the Interior pursuant to the Indiana Financing Act of 1974.[21] The remaining ten percent is guaranteed by the Tribe through the assignment to the bank of a $600,000.00 certificate of deposit.

Much of the state's evidence in this case has been submitted to prove that the Tribe's financial participation in the funding has amounted to practically nothing. Presumably, the state believes this fact supports its argument that the contractors are taxable.

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[20] It has been stipulated that the precise amounts of assessment are not an issue in the action.

[21] *25 U.S.C.A. § 1451 et seq.*

However, the source of the funds for the project has nothing to do with the issue.

The Tribe had not budgeted such taxes as a cost in its proposal to the E.D.A. for funds to build the complex, although E.D.A. does permit inclusion of the cost of passed-on state taxes in a grant for a project. After the initial bids for various aspects of the complex were received, the Tribe told the contractors that the four percent gross receipts tax would not be due to the state and instructed them to submit alternative bids omitting such costs. The Tribe found it necessary to enter into an indemnification agreement with each contractor, agreeing to reimburse each for any such tax that might be determined to be due the state. If the taxes in question are found to be due, the amount of money owed the state is substantial, and the cost is imposed upon the Tribe by virtue of its indemnification agreements with the contractors.

[7,8] This Court[22] and the courts of New Mexico[23] have heretofore held that the New Mexico gross receipts tax is a tax upon the seller. It is levied on the privilege of engaging in certain activities in New Mexico,[24] including construction activities.[25] Construction services include all tangible personal property that becomes an ingredient or component of a construction project.[26] The taxes due are an obligation only of the person engaging in business in the state.[27] The deduction allowed for sales of tangible personal property to

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[22] *United States v. State of New Mexico et al.*, No. 75-425-B (D.N.M. July 1, 1976).

[23] *First National Bank of Santa Fe v. Commissioner of Revenue*, 80 N.M. 699, 460 P.2d 64 (N.M.Ct.App.1969); *Bell Telephone Laboratories v. Bureau of Revenue*, 78 N.M. 78, 428 P.2d 617 (N.M.1966).

[24] *N.M.Stat.Ann.* § *72-16A-2* (Repl.1974) (Supp.1975).

[25] *N.M.Stat.Ann.* § *72-16A-3 K* (Repl.1974) (Supp.1975).

[26] *Ibid.*

[27] *N.M.Stat.Ann.* § *72-16A-4, 5, 6* (Repl.1974) (Supp.1975).

Indian tribal governments for use on the reservation[28] does not apply. This provision does not reflect an intent to exempt construction services and the tangible personal property used to perform such services when the work is performed for an Indian tribe on its reservation by a non-Indian contractor, coming onto the reservation for the purposes of rendering construction services. Under the state's tax act, the contractors involved in the construction of the resort complex are subject to a tax on the gross receipts they received for performing construction services. The legal incidence of the tax falls upon them and not upon the Tribe or Tribal property. The state is imposing the tax solely on non-Indians who have performed services for the Tribe.[29]The umbrella of immunity from state taxation covering reservation land and income earned on the reservation by a reservation Indian is not wide enough to shield them from its imposition.

There is no question that the imposition of the tax will have an economic effect upon the Tribe. Such taxes normally are "passed on" to the purchaser. Here, in addition, the Tribe has contracted to indemnify the construction companies, but this contractual arrangement has nothing to do with whether the state

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[28]*N.M.Stat.Ann. § 72-16A-14.9* (Repl.1974) (Supp.1975).

[29]When the Tribe attempted to intervene in the state administrative hearings involving the assessment against one of its contractors, its motion to intervene was denied by the Commissioner of the Bureau of Revenue. Pursuant to *N.M.Stat.Ann.§ 72-13-19* (Repl.1974) (Supp.1975), the Tribe appealed to the state court of appeals. The Court found that the Tribe, liable for the taxes only by virtue of its contract of indemnity, was not a taxpayer, i.e., one liable for payment of a tax or one who had been assessd, *N.M.Stat.Ann. § 72-13-15(O)* (Repl.1974) (Supp.1975), and dismissed the appeal. *Mescalero Apache Tribe v. Bureau of Revenue*, 88 N.M. 525, 543 P.2d 493 (N.M.Ct.App.1975).

The Tribe claims that the refusal to allow it to intervene in the state administrative hearings denied it and its contractors due process of law. However, it is concluded that the state court of appeals properly decided the issue against the Tribe. It is not the taxpayer and is not entitled to intervene solely because it has agreed to indemnify contractors for taxes that have been assessed against them.

can levy the tax upon the contractors. The effect is to reduce monies the Tribe could spend well on other things, but this does not make the tax anything more than an indirect burden on the Tribe. *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *see Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972). It does not rise to the level of state infringement on the right of reservation Indians to make their own laws and be ruled by them. *See Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d251 (1959).

[9,10] Nor does the enactment of gross receipts tax and licensing ordinances by the tribal council make improper the imposition upon contractors of the state's gross receipts tax. It does not interfere with tribal self-government simply because the tribe and another entity may have the power to impose a tax in the same area. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 938, 97 S.Ct. 1687, 52 L.Ed2d 377 (1977). While it may be true that the Tribe has the power to grant the privilege of engaging in business on the reservation, it is also true that the state has the power to tax business conducted in the state. The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico, and at the very least, the contractors were accorded benefits by and protection from the state as they went to and from the reservation.

Alternatively to its assertion that the state's gross receipts tax interferes with tribal self-government, the Tribe argues that there is governing federal legislation, leaving no room for the state to impose its tax in the present circumstances.

[11] In this connection, there is no merit in its contention that its gross receipts tax and licensing ordinances, as approved by the Secretary of the Interior, amount to federal pre-emption. The Tribe is organized pursuant to the Indian Reorganization Act,[30] and its

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[30] *25 U.S.C.A. §§ 461 et seq.*

legislative actions are subject to review by the Secretary. However, his actions in approving taxing and licensing ordinances do not amount to federal preemption and thus oust state jurisdiction to levy its tax. *See Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d at 1255-56.

[12] Nor does the Indian Reorganization Act otherwise support the Tribe's pre-emption theory. That legislation was passed to encourage Indian development, but it did not expand Indian tax immunity to include the situation where a tax levied against someone else imposes only an economic burden on the Tribe. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 153-54 n.9, 156 n.12, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d at 1256. The Tribe's reliance on the New Mexico Enabling Act[31] is equally misplaced, for the tax in issue here is neither a tax upon Indian lands nor a use tax upon tangible personal property permanently attached to the land.

As indicated previously, the Indian Trader's licensing provisions, *25 U.S.C.A. §§ 261-64*, do not pre-empt the field under the facts and circumstances of this case, and the Tribe's further claim that the Buck Act[32] supports it position is not tenable. Section 109 of that act was only intended to preserve the immunity from state income tax of the income of reservation Indians earning their income on the reservation by excepting them from coverage under the Act. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 177-78, 93 S.Ct. 1257, 36 L.Ed.2d (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. at 691 n.18, 85 S.Ct. 1242. Further, the failure of the state to assume jurisdiction over civil causes of action between Indians country situated in the state[33] has no relevance to the instant action.

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[31] See p. 1066 and note 1 *supra*.

[32] *4 U.S.C.A. §§ 105-110*.

[33] Note 3 *supra*.

[13,14] The Tribe properly contends that its treaty with the United States precludes the extension of state tax laws to reservation Indians and lands. It improperly contends that it follows from its treaty that no state law has any force and effect on the Mescalero Reservation. If the Tribe is saying that the state cannot impose its gross receipts taxes upon the contractors' receipts from the activities they carried on within its reservation bounds simply because those activities were on the reservation, such is not the law. *See Mescalero Apache Tribe v. Jones,* 411 U.S. at 148, 93 S.Ct. 1267. While the provisions of its treaty are to be liberally construed in favor of the Tribe, *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930), the treaty does not insulate from state jurisdiction everyone and everything coming in contact with the Tribe and occurring on its land.

[15] Further, the commerce clause of the United States Constitution does not provide a basis to strike down the state's effort to tax the contractors. That effort could be invalidated only if it were to be found inconsistent with federal statutes and thus invalid under the supremacy clause, U.S. Const., art VI, cl. 2. *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 481 n.17, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[16] The last challenge to the gross receipts tax is based upon the due process clause of the fourteenth amendment to the federal Constitution. The essence of the claim is that the state should not be allowed to impose a tax for which it gives little or nothing in return. The Tribe relies on *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. at 690-91, 85 S.Ct. 1242, to support its position. While it is true that the *Warren Trading Post* reasoning cannot be restricted to cases involving licensed Indian traders, *McClanahan v. Arizona Tax Comm'n,* 411 U.S. at 1170 n.6, 93 S.Ct. 1257, it does not follow that the case can be so broadly construed as to oust the state's power to tax the non-Indian contractors involved in this action. As indicated before, they did receive benefits from the state. Since the tax is not a tax upon the Tribe or its

members, its claim that it has received minimal benefits from the state is irrelevant to the issue of the validity of the tax. It is noted in passing, however, that there is evidence in the case of state benefits to Mescalero Apache Indians. In any event, it is settled that "taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared." *Thomas v. Gay*, 169 U.S. at 278, 18 S.Ct. at 345.

IV.

This case has presented one aspect of a problem that is with increasing frequency facing the courts. On one side are the Indians, subject to the plenary power of Congress. On the other side are the states, anxious to control what transpires within their borders and to raise revenues from whatever source they can. There is currently strong Indian resistance to any state effort to exert control over or to tax non-Indians doing business with the Indians. There is an equally strong effort by the states to fill with state laws any void existing by virtue of Congress's failure to enact governing legislation.[34] Between them stand the courts, hampered by Congressional inaction on the subject.

The whole area of state jurisdiction over non-Indians doing business with Indians on Indian lands deserves Congressional review and the enactment of definitive federal legislation. In their absence, the courts can only cope with each fact situation that arises within a framework of fragmentary legislation. Further, the scope of the problem is such that it does not lend itself to resolution by the process of piecemeal adjudication. Yet this is precisely what must happen in the absence of Congressional action, and it is done by judges who do not possess:

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[34] *See generally* M. Price, Law and the American Indian Ch. II (1973); Note, 2 N.M.L.R. 71 (1972); Comment, 2 N.M.L.R. 81 (1972).

"(T)he legislature's superior resources for fact gathering; its ability to act without awaiting an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its practice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will—all these give the legislature a position of decided advantage, if only it will use it."[35]

A judgment will be entered herein, granting declaratory relief as to the claim that Quiller Construction Company is exempt from New Mexico's gross receipts tax and finding for the state on all other issues in the action.

JUDGEMENT

This action having come on for trial to the Court, and the Court having filed herein its Memorandum Opinion containing its findings of the fact and conclusions of law; Now, Therefore,

IT IS DECLARED AND ADJUDGED that the State of New Mexico through its Bureau of Revenue and the Commissioner of Revenue may not impose upon Quiller Construction Company, Inc., its gross receipts tax for the purchase price of materials used in connection with a tribal housing project on the Mescalero Apache Reservation, and that the state may impose its gross receipts tax on Quiller Construction Company for monies it received in payment for its services in connection with the housing project.

IT IS FURTHER DECLARED AND ADJUDGED that the defendant Secretary of Interior and his subor-

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[35] *H. Friendly, Benchmarks* 46 (1967).

dinates, in authorizing and granting Indian traders' licenses to the corporations named herein acted beyond the scope and intent of 25 *U.S.C.A.* §§ 261-64 and 25 *C.F.R.* §§ 251.1-26.

IT IS FURTHER DECLARED AND ADJUDGED that the State of New Mexico may impose its gross receipts tax upon Burn Construction Co., Inc., Boone Electric Co., Inc., Lew Hammer, Inc., Howell Construction, Inc., Intermountain Specialty Construction, Inc., Western Landscape Construction, Inc., and Ramey Construction Co., Inc., for their work on the Inn of the Mountain Gods resort complex and the recreation and campground area.

IT IS THE FURTHER ORDER OF THE COURT that each side bear its own costs of action.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Civil No. 76-171B

MESCALERO APACHE TRIBE, Plaintiff,

V.

FRED L. O'CHESKEY, et al., Defendants.

STIPULATION

Plaintiff Mescalero Apache Tribe (hereinafter referred to as "Tribe"), and Defendants State of New Mexico, Bureau of Revenue, and Fred L. O'Cheskey (hereinafter referred to as "Bureau of Revenue") and additional Defendants Kleppe, Thompson, Nicholsen and McDonald (hereinafter "United States") by their respective attorneys hereby stipulate as follows:

I. SCOPE AND USE OF STIPULATION

1. This stipulation is made for the purpose of introduction before the District Court in considering the Tribe's original complaint and the Bureau of Revenue's counterclaim.

2. The facts contained in this stipulation and the documentary evidence and depositions referred to herein govern the following assessments brought by the Bureau of Revenue against the following named contractors: Burn Construction Co., Inc., Assessment No. 139092, $15,352.25; Boone Electric Co., Inc., Assessment No. 141005, $11,479.10; Lew Hammer, Inc., Assessment No. 140672, $34,792.00; Howell Construction, Inc., Assessment No. 141322, $11,982.31; Intermountain Specialty Construction, Inc., Assessment No. 140673, $2,557.38; Quiller Construction Co., Inc., Assessment No. 136023, $83,869.80; Western Landscape Construction, Inc., Assessment No. 140674, $11,509.62; Ramey Construction Co., Inc.,

Assessment Nos. 140671 and 135580, total of $210,507.04.

3. The facts concerning the assessments against Ramey Construction, Quiller Costruction, Western Landscape, and Burn Construction are set out in detail in this stipulation. It is the Tribe's contention that the facts relating to Quiller are unique from all the other contractors and require a separate determination. It is agreed that the legal and factual issues raised in the tax assessment against Western Landscape and Ramey are identical to those concerning all the remaining out-of-state contractors and that the legal and factual issues raised in the tax assessment against Burn are indentical to those concerning all the remaining in-state contractors and that the decision as to these three contractors shall be deemed to be controlling and shall be res judicata and collateral estoppel for all parties and the name contractors.

4. The parties generally agree as to the arithmetic correctness of the assessments levied by the Bureau of Revenue on the various contractors. The parties agree as to the specific arithmetic correctness of the assessments of Burn and Howell. As to some contractors it is possible that the tax base on which the assessment is levied is not entirely correct due to reliance on interim financial reports or other documents. In any event, the precise amounts of the assessment are not an issue in the case and, as to the named contractors, will be adjusted upon submission of further documentation from the contractors.

5. All depositions taken in preparation for this case except those of Wendell Chino, Richard Wardlaw, Stanley French, and Fred Heckman are submitted and relied on by the parties as if they were testimony in open court.

6. The parties may rely on the depositions and attached exhibits, interrogatories, and documentary evidence in this case as they see fit, despite the fact that specific facts found in those depositions or documentary evidence are not elements of this stipulation.

7. All exhibits attached to depostions filed in this

case are admitted.

8. The facts and conclusions in any sentence beginning "The Tribe contends..." or "It is the Bureau's contention that..." are assertions of the named party only and are neither stipulated to, nor concurred in, by any other party.

II. GENERAL FACTS

1. This case concerns two basic issues: First, the liability under the New Mexico Gross Receipts and compensating Tax Act §§72-16A-1 to 72-16A-19, N.M.S.A. 1953 of certain non-Indian contractors on their receipts from performing construction for the Mescalero Apache Tribe on the Mescalero Apache Indian Reservation located in New Mexico. Second, the validity and legal effect of Indian traders licenses issued by the United States to the contractors assessed, purportedly under the authority of §25 U.S.C. §264 and the regulations promulgated thereunder, attached as Exhibit 1.

2. The Mescalero Apache Tribe is an organized Indian Tribe residing on its own reservation in Southern New Mexico.

3. The reservation of the Mescalero Apache Tribe was first created by the United States Presidential Executive order in 1873.

4. Additional Executive Orders, the last one in 1917, established the present boundary lines of the Mescalero Apache Tribe reservation within Otero county, New Mexico.

5. The boundary lines of the Mescalero Apache Tribal reservation are well marked, fenced and posted.

6. The Mescalero Apache Tribe has a formally organized constitutional Government consisting of a President, (Executive Branch), Tribal Council (Unicameral Legislative Branch), and a Tribal Court (Judicial Branch).

7. The Mescalero Apache Tribe first adopted a constitutional form of Government by adoption of their Constitution March 25, 1936, pursuant to the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), as

amended by the Act of June 15, 1935 (49 Stat. 378). A copy of the constitution is Exhibit 2.

8. The Mescalero Apache Tribe revised this Constitution January 12, 1965, to its present form and content.

9. Article IX, §1(d) of the Tribal Constitution provides that the Mescalero Apache Tribe Constitutional Government regulates and controls by ordinance and resolution the conduct of all business or industry conducted by the Tribe or on the Tribal reservation and for the purposes of furthering the economic well being of the members of the Tribe.

10. The Mescalero Apache Tribe Constitutional Government has the power to enact ordinances subject to the review of the Secretary of the United States Department of Interior, governing and regulating social and domestic relations of Tribal members, and do all things necessary for maintaining tribal agencies, departments and otherwise providing a regulated, harmonious and peaceful life within the Mescalero Indian reservation.

11. Article IX, §1(s) of the Tribal Constitution provides that the Mescalero Apache Tribe has the authority and power to enact and enforce ordinances for the "assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation".

12. Approximately 1,000 of the tribal members living on the reservation work for the Tribe. The legislative branch consists of eight council members who receive no salary but per diems and one paid secretary. The judicial branch consists of six persons, including two tribal judges and several clerks. The remainder work for the Executive branch of the Tribe.

13. Tangible personal property was purchased and incorporated in the construction projects involved herein.

14. All of the tangible personal property involved in this case was attached as improvements to the land within the boundaries of the Mescalero Indian Reservation.

15. The Bureau contends that all construction

materials incorporated by the construction contractors into the project improvements were elements of construction services under §72-16A-3(K), N.M.S.A. 1953.

16. The State of New Mexico provides certain services to members of the Tribe living on the Reservation.

17. The Bureau of Revenue contends that the extent of such services is as set out in the deposition of Jeffrey States and in the report which is attached as Exhibit 3.

18. The Mescalero Tribe pays "passed on" New Mexico gross receipts taxes billed by persons supplying services to the Tribe off the Reservation, such as accounting and repair services.

19. The Mescalero Tribe pays New Mexico gross receipts taxes on its own receipts from operating the Sierra Blanca ski resort located outside the Reservation boundaries. Its receipts totalled about one million dollars in a recent year. Such taxes are paid by reason of the decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

20. The United States is represented on the reservation by the Mescalero Agency, and entity of the Bureau of Indian Affairs of the Department of the Interior. The agency provides a variety of services on the reservation financed by its own budget, and is directed by a superintendent and various division heads.

21. The Tribal Council approves a yearly tribal budget which is subject to approval by the Secretary of the Interior.

22. Copies of proposed tribal budgets for the years 1972-1976 are attached as Exhibits 4, 5, 6, 7, and 8. Summaries of actual expenditures for these years are attached hereto as Exhibit 9. Budgets for the Mescalero Agency of the Bureau of Indian Affairs for the years 1973-1975 are attached hereto as Exhibit 10. The tribal budgets and related documents may be sealed by the court at the conclusion of trial and are to be used only for purposes of appeal subsequently.

IV. THE INN OF THE MOUNTAIN GODS

1. In the mid 1960's, the Tribe commenced planning a tourist resort complex to be constructed on the reservation. Preliminary feasibility studies were performed concerning the construction of a hotel, golf course, artifical lake, and additional facilities.

2. The "Inn of the Mountain Gods" is located within the boundairies of the Mescalero Indian Reservation. The Inn is a large hotel resort consisting of a hotel, lake, golf course, and tennis facilities. Six of the contractors involved in this case built, pursuant to contracts with the Mescalero Apache Tribe, all of these facilities at the Inn of the Mountain Gods.

3. The Inn of the Mountain Gods was planned and constructed to generate income for the Mescalero Apache Tribe which may be used for the economic development of the Tribe.

4. The "Inn of the Mountain Gods" is a part of the tourism project promulgated by the Mescalero Apache Tribe Government to replace anticipated declining income from lumbering enterprises within the Indian Reservation.

5. Principal funding for the project was obtained from the Economic Development Administration, an agency of the United States Department of Commerce. The Economic Development Administration (hereinafter "EDA") provides funds for a variety of development projects. The majority of its grants are made to entities other than Indian tribes.

6. The budget for the project which accompanied the Tribe's proposal to EDA did not make any provision for the cost of the New Mexico gross receipts and compensating tax liabilities which might be incurred by the contractors hired for the construction. In planning the budget, the subject of state gross receipts taxes had not been considered and its absence in the budget was not the result of any conscious decision by the Tribe.

7. EDA guidelines permit inclusion of the cost of "passed-on" New Mexico or other states' taxes in a grant for a project.

8. The Tribe initially sought to obtain a single contractor to undertake the entire project. However, only one contractor submitted a bid and it was considerably larger than the available funds.

9. Accordingly, the Tribe decided to divide the project into a number of sub-projects, each of which could be individually bid on. In addition, the Tribe deleted certain physical elements of the project in order to bring the total cost within the available funds.

10. As the Tribe received bids on the various elements of the project, it realized that some of the contractors might have included their cost for New Mexico's gross receipts and compensating taxes, either as a separate item in their bids or as an element of the overall bid. Accordingly, the Tribe wrote to each contractor asking if they had included gross receipts and compensating taxes in their bid. If they had, the Tribe asked them to submit an alternate bid specifically omitting any amount for gross receipts and compensating taxes.

11. The EDA had to approve all contractors whom the Tribe wished to accept, as well as approve the contracts entered into with each contractor. In practice, the EDA did not disapprove any of the contractors which the Tribe wished to use.

12. Construction on the project commenced roughly in July, 1973. On June 20, 1973, the Tribe took the following steps:

a. The Tribal Council enacted Ordinance 73-1 which required a license from the Tribe for anyone coming on the Reservation to do business there. (This license is distinct from the Indian Traders Licenses issued by the Bureau of Indian Affairs). The ordinance was approved by the delegate of the Secretary of the Interior. In practice, the Tribe has never issued such a license to any person including the contractors whose assessments are at issue in this case. The Tribe waived the requirement of such a license as to Ramey Construction (Exhibit 22). The Tribe contends that its "notices to proceed" (a sample of which is attached as Exhibit 23) and the construction contracts with the various contractors constituted waiver of the license

requirement as to all other contractors. The ordinance is attached hereto as Exhibit 24.

b. The Tribal Council enacted Ordinance 73-2 which levied a tax on the gross receipts derived by anyone doing business on the reservation. The ordinance was approved by the delegate of the Secretary of the Interior. The ordinance provided that the Tribe could waive imposition of such tax at its discretion. In practice, no person, Indian or otherwise, has ever paid any tax under this ordinance, including the contractors whose taxes are at issue here. The Tribe has no documents indicating waiver of these taxes and states that it "informally" waived such taxes. The ordinance is attached as Exhibit 25.

c. The Tribal Council enacted Ordinance 73-3 which required issuance of a license by the Tribe for anyone performing construction services on the reservation. (This license is distinct from the Indian Traders Licenses issued by the Bureau of Indian Affairs). . The ordinance was approved by the delegate of the Secretary of the Interior. In practice, the Tribe has never issued such a license to any person including the contractors whose assessments are at issue here. The Tribe waived the requirement of such a license as to Ramey Construction, Exhibit 22 attached. The Tribe contends that the "notices to proceed" (a copy of which is attached as Exhibit 23) plus the construction contracts with the various contractors constituted waiver of the requirement of this license. A copy of this ordinance is attached hereto as Exhibit 26.

d. The superintendent of the Mescalero agency issued Bureau of Indian Affairs "Indian Traders Licenses" to all of the contractors whose tax liabilities are at issue here. These licenses are discussed in greater detail in Part V of this stipulation.

13. Among the contractors working on the project were Ramey, Western Landscape, and Burn. Pertinent facts pertaining to these contractors are as follows:

a. Burn is a New Mexico corporation. Ramey is a Texas corporation. Western Landscape is an Arizona corporation. Each has done business in New Mexico

apart from the work on this project. Each holds a contractor's license from its respective state.

b. Burn did a substantial amount of "dirt work" on this project, i.e., excavation and related work. Ramey and its subcontractors built most of the hotel itself. Western Landscape and its subcontractors installed an irrigation system and did a substantial amount of dirt work and earth moving to build an artifical waterfall, installed lawns and trees and performed other landscaping for the project.

c. Burn caused its suppliers to apply for Indian Traders Licenses issued by the Bureau of Indian Affairs. (Pertinent correspondence is attached as Exhibit 27). Western Landscape did not utilize New Mexico nontaxable transaction certificates, and in many cases paid "passed-on" gross receipts taxes to its New Mexico suppliers and sales taxes to its out-of-state suppliers. Ramey told its suppliers that they were not subject to tax on their sales to Ramey.

d. In ordering supplies and in dealing with subcontractors, each contractor ordered or contracted in its own name and paid for the purchased materials or services in its own name.

e. None of the contractors' work was, to their knowledge, inspected by any official of the New Mexico state government. Their work was inspected by representatives of the EDA and by the supervising architect for the Tribe, Boyle Engineering.

f. A representative of the New Mexico Construction Industries commissioner, the state agency responsible for inspecting construction work in the state, visited the Mescalero Reservation before construction of the Inn began. His requests that the Inn contractors obtain New Mexico building permits and that he inspect their work were refused by President Chino of the Tribe and the representative left the reservation. The Construction Industries Commission made no further attempt to assert its jurisdiction over any of the Inn projects, including issuing licenses to any contractor who did not already have one.

g. Only Mescalero Apache Tribe agents and the United States Government authorities ever actually

performed inspection or supervision of the construction activiteis of the various construction companies' work.

h. None of the contractors included its potential gross receipts tax liability in its contract price finally agreed to either overtly or covertly.

i. Each of the contractors entered into an indemnification agreement with the Tribe by which the Tribe warranted that if any gross receipts tax liability came due, the Tribe would reimburse the contractor. A sample indemnification agreement is attached as Exhibit 28.

j. Absent such an indemnification agreement, the Tribe would have had no obligation to pay its contractors' "passed-on" gross receipts or compensating taxes. Many of the contractors would not have agreed to remove the gross receipts tax from their bids, absent such an indemnification agreement (see §V, para. 12).

k. Each of the contractors applied for, and was issued, an Indian Traders License by the superintendent of the Merscalero agency. These licenses are discussed in greater detail in Section V of this stipulation.

l. In one Ramey tax assessment case $18.52 of the claimed tax, penalty and assessment has been paid by Ramey and the contractor reimbursed by the Mescalero Apache Tribe.

m. Actual payment places the economic burden on the one required to ultimately pay the tax.

14. The Inn of the Mountain Gods project was financed through EDA funds and one loan of $6,000,000 from the Bank of New Mexico. Ninety per cent of the Bank of New Mexico loan is guaranteed by the Secretary of the Interior. Ten per cent of the loan is guaranteed by the Tribe through the assignment of a certificate of deposit in the amount of $600,000 to the Bank of New Mexico. The source of these funds is Tribal funds previously deposited with the Secretary of the Interior. Five million, four hundred thousand dollars of the loan was assigned to the New Mexico State Investment Council, a transaction provided for in the initial loan documents. Pertinent documents in-

clude the loan agreement, a "plan of operations" prepared by the Tribe, a chart of anticipated cash flow from the Inn operation prepared by the Tribe and miscellanous other documents all constituting Exhibit 29. The Tribe furnished no capital for the construction of the Inn.

15. At present, the Tribe is constructing certain additional facilities at the Inn of the Mountain Gods utilizing EDA grants received after the initial grant. These facilities include those which were eliminated from the original specifications for the Inn because of the size of the initial grant.

16. This additional construction includes a skeet-shooting (clay bird) range, a stables complex, a recreation building related to the gold course, a kitchen addition, toilet facilities for the golf course, air conditioning of the Inn's rooms, various signs, paved walkways on the golf course, tennis courts, paddle tennis courts and a water treatment facility.

17. The Bureau of Revenue contends that it is the testimony of James French, the Tribe's construction supervisor, that upon completion of the current construction, the Inn project will contain all of the items contemplated at the time the project was put out for original bids, except for certain non-revenue producing facilities, and that certain additional items have been added beyond what was originally contemplated.

18. The cost of building the Inn, the cost of operating the Inn, and the cost of servicing debts arising from the construction and operation of the Inn are not elements of the tribal budget but are carried on the profit and loss statement of the Inn (see Exhibit 30 attached).

19. The Economic Development Administration permits a grantee to submit a proposal to amend its original grants if it requires additional funds. Such requests may or may not be granted. The Mescalero Tribe has received two amendments to original grants for the Inn project.

20. The Tribe conducts an advertising campaign to attract visitors to the Inn. Budgeted expenditures for fiscal year 1976 total $58,000.

21. Ninety-seven per cent of the guests at the Inn are non-Indian from off the Reservation.

22. Imposition of the 4% New Mexico gross receipts tax on the construction contractors is an increase of cost to the Mescalero Apache Tribe on each of the contracts involved in this case, which cost may be paid out of the cash flow of the Inn, or from governmental grants, governmental loans or out of Tribal funds.

V.

INDIAN TRADERS LICENSES

1. Most of the contractors concerned with the construction of the 100 houses and of the Inn of the Mountain Gods were issued Indian Traders Licenses signed by Lawrence Koslowski, the superintendent of the Mescalero agency at the time, or by Walter Glazewski, the deputy superintendent at the time.

2. These licenses and renewals thereof were obtained by completion of an application, and payment of a $5 fee and a $10 bond. The amount of the bond was established pursuant to the discretionary authority of the Superintendent of the Indian Reservation and could have been set as high as $10,000. A copy of the documentation submitted by the contractors is attached as Exhibit 31. The Indian traders licenses for the eight contractors assessed, except for that of Lew Hammer, are attached as Exhibit 32. The licenses for all other contractors and material suppliers and related correspondence is Exhibit 33.

3. Prior to the commencement of the housing and Inn construction, some non-Indians had been permitted to engage in business on the Mescalero Reservation without issuance of a license. These included one Vance, one Cubbock and an un-named third person, each of whom held a lease on the tavern owned by the Tribe within the boundaries of the reservation and operated as agent under a New Mexico state liquor license owned by the Tribe. In addition, the Chevron gas station within the reservation boundaries was operated by a non-Indian without a license.

4. During the construction of the Inn, Boyle Engineering and two subcontractors worked on the reservation for an extended period without having applied for or received an Indian Traders License.

5. According to Lawrence Koslowski, then Superintendent of the Mescalero Agency of the Bureau of Indian Affairs it was his decision to issue licenses and this decision emanated from a desire to maintain control over the persons coming onto the reservation. It is his recollection that he was at no time aware of possible gross receipts tax consequences in issuing the licenses and did not become aware of any such consequences until early 1977, long after he left the reservation.

6. The Mescalero Tribe was aware of the exemption from potential state taxation by the use of Federal Indian Traders Licenses as early as 1972, based on *Warren Trading Post v. Tax Commission*, 380 U.S. 685 (1965).

7. It is President Chino's recollection that prior to June, 1973, there were construction companies doing business on the Mescalero Reservation without Indian Traders Licenses. It is further his recollection that for a number of years he, as an individual, as well as other members of the Tribal Council were aware that the Tribal Council should require the issuance of Indian Traders Licenses to persons coming on the reservation.

8. Superintendent Koslowski has no written documentation nor can he recall dates or places at which he participated in discussions concerning Indian Traders Licenses with tribal officials or other Bureau of Indian Affairs officials.

9. On June 27, 1973, a "preconstruction conference" was held at the Mescalero Community Center on the reservation. In attendance were most of the contractors selected to build the Inn and adjacent facilities, Deputy Superintendent Glazewski, President Chino, his administrative assistant Richard Wardlaw, and George Fettinger of the firm of Fettinger and Bloom, the Tribe's counsel. A list of the persons in attendance is attached hereto as Exhibit 34.

10. It is Deputy Superintendent Glazewski's recollection that he participated in no discussions concerning the issuance of Indian Traders Licenses prior to that June 27th meeting, except that Superintendent Koslowski informed him that such licenses should be issued to the contractors and that he should attend the meeting. He states that he had no discussion with the superintendent concerning the rationale for the issuance of the licenses. He does not recall the specific events at the June 27th meeting but recalls that Indian Traders Licenses were discussed at the meeting, that he issued applications to be filled out by the contractors at that meeting, and has a vague recollection that the subject of the tax consequences of the issuance of these licenses was discussed.

11. Representatives of Burn Construction, Ramey Construction, and Western Landscape in attendance at that meeting recall that either Mr. Fettinger or Mr. Wardlaw made a presentation concerning Indian Traders Licenses which led them to believe that avoidance of the New Mexico gross receipts tax was a principal reason for the issuance of these licenses. (Representative correspondence is attached as Exhibits 27 and 35.)

12. It is the recollection of the representative of Ramey Construction that at the meeting oral representations were made by tribal officials that the contractors would not be subject to New Mexico gross receipts or compensating taxes. The representative of Burn Construction stated that he would not enter into a contract with the Tribe based on oral representations concerning state tax liability. At this point, counsel for Ramey and counsel for the Tribe left the meeting and , shortly thereafter, returned to the meeting with the indemnification agreement (Exhibit 28) assuring the contractors that the Tribe would indemnify them for any taxes. With this assurance, the contractors signed their contracts with the Tribe and applied for Indian Traders Licenses.

13. Burn requested that a number of its suppliers obtain Indian Traders Licenses. Correspondence requesting that they do so is attached hereto as Exhibit 27.

14. These suppliers did not come on the reservation except, in some instances, to deliver the supplies which Burn had ordered.

15. To the extent that any of the contractors had a right to use real property on the reservation, it was a right to store goods and maintain machinery, and work in the area on and about the Inn project and such other use as was made necessary by the terms of each respective contract. The contractors and their non-Indian employees departed the reservation at the end of each working day.

16. Superintendent Koslowski issued the licenses on his own authority pursuant to a redelegation order which is attached hereto as Exhibit 36. He recalls discussing issuance of the licenses with an area director of the BIA but has no documentation of these discussions nor does he recall specific dates. In any event, it is his recollection that he did not seek nor obtain authorization from this area director to issue licenses but simply informed him of what he planned to do.

17. Superintendent Koslowski was not furnished with a list of all construction personnel hired by the various contractors and coming on the reservation. He did have the names of one or more officers or foreman from each contractor who was issued a license.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 13 1981
MICHAEL RODAK, JR., CLERK

No. 80-812

IN THE

Supreme Court of the United States

October Term, 1980

THE MESCALERO APACHE TRIBE,
Petitioner,

v.

FRED L. O'CHESKEY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents oppose the granting of certiorari in this case for the reasons set out below.

QUESTION PRESENTED

In Respondents' view, the question presented is whether New Mexico's gross receipts tax on the receipts of a non-Indian construction contractor working for an Indian tribe is pre-empted when there is no comprehensive federal scheme regulating the construction contractor's activities.

STATEMENT OF THE CASE

The focal point of this case is the Mescalero Apache Tribe's $23 million hotel and resort complex designed to attract non-Indians to the facilities. *Pet.*, 11c-12c. The complex was constructed for the Tribe by non-Indian construction contractors. *Pet.*, 11b-12b. New Mexico's tax is on the receipts of these construction contractors.[1] *Pet.*, 1c-2c.

Petitioner's statement significantly omits the fact that the Economic Development Administration grants, which were the principal source of funding for the construction of the Tribe's tourism hotel,[2] were not given to the Tribe as part of a special program for Indian tribes. *Pet.*, 6c. The Economic Development Administration provides monies for a wide variety of development projects, and the majority of its grants are made to entities other than Indian tribes. *Pet.*, 6c.

Furthermore, the regulations of the Economic Development Administration expressly permit inclusion of the amount of state taxes as part of the total construction cost, *Pet.*, 6c, including "passed-on" New Mexico gross receipts taxes on the construction contractors.

The construction contractors that built the resort complex are corporations existing under New Mexico, Arizona and Texas law. *Pet.*, 2c, 8c. They are all licensed by their home states, *Pet.*, 9c, and each of them has done construction work in New Mexico other than the resort complex for the Tribe. *Pet.*, 8c-9c.

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1. The legal incidence of New Mexico's gross receipts tax is on the seller, here the contractors, even though its economic burden may be passed on to the buyer. *United States v. State of New Mexico*, 581 F.2d 803 (10 Cir. 1978).

2. The Tribe furnished no capital for the construction of the hotel, *Pet.*, 11c, all of it coming in the form of grants or loans from the federal government.

Although their construction work took place on the Reservation, *Pet.*, 6c, the construction contractors and their non-Indian employees departed the Reservation at the end of each working day. *Pet.*, 15c.

With respect to the Indian trader licenses issued to the construction contractors, Petitioner also fails to note that the District Court, after considered discussion,[3] declared that the Secretary of the Interior, in authorizing and granting Indian trader licenses to the construction contractors, acted beyond the scope and intent of 25 U.S.C. §§261-264. *Pet.*, 20b. Neither the Tribe nor the Secretary of the Interior appealed from this judgment.

REASONS FOR DENYING THE WRIT

The primary reason to deny the writ is that the Tenth Circuit's decision is correct. The heart of Petitioner's argument is that New Mexico's tax is preempted by a federal regulatory scheme applicable to the non-Indian construction contractors' activities. It relies exclusively on this Court's recent opinions in *White Mountain Apache*[4] and *Central Machinery*,[5] all but ignoring *Washington v. Confederated Tribes of Colville Reservation*, ____ U.S. ____, 100 S.Ct. 2069 (1980), which squarely supports New Mexico's ability to tax the contractors' activities. There this Court held that Washington could properly tax reservation sales of cigarettes, even when the impact of the tax on the tribal enterprises was crippling. New Mexico's tax, by contrast, carries no such comparable impact.

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3. Found at *Pet.*, 4b-7b.

4. *White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. 2578 (1980).

5. *Central Machinery Co. v. Arizona State Tax Comm'n*, ____U.S.____, 100 S.Ct. 2592 (1980).

White Mountain Apache is quite clearly inapposite. The taxpayer in *White Mountain Apache* was engaged in logging on the reservation. Every significant aspect of its logging activities was detailed by federal government regulations. The holding of this Court was that

> ". . . the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their . . . taxes . . . for operations . . . within the reservation. There is no room for these taxes in the comprehensive federal scheme."
>
> 100 S.Ct. at 2586.

By contrast, the details of construction operations of the contractors on the Tribe's Reservation were unregulated by the federal government. The construction contractors' building activities were subject to no BIA regulatory scheme, nor in fact did any agency of the United States perform any supervisory role of any substance as to construction. This significant difference between the instant case and *White Mountain Apache* makes it clear that the Tenth Circuit's decision is unassailable.

It is true that the Tribe's resort complex was funded almost entirely by federal grants from the Economic Development Administration, an agency of the United States. *Pet.*, 6c. It is also true that the contractors were approved by the Economic Development Administration, *Pet.*, 7c, but the Economic Development Administration regulatory scheme, under which this money was given to the Tribe, unambiguously recognized state taxes as a part of the total construction cost. *Pet.*, 6c. There can hardly be any preemption if the federal regulatory scheme itself expressly allows state taxes such as New Mexico's. The Tribe's status as a result of receiving an EDA grant is no different than the status of any of the thousands of that federal agency's non-Indian beneficiaries.

Nor do recitals of a general federal policy favoring Indian self-determination aid the Tribe. The laudable but irrelevant pieces of legislation cited by the Tribe, *Pet.*, 10-11, do not add up, either singly or collectively, to a scheme of regulation of building construction on a reservation. *Washington v. Confederated Tribes of Colville Reservation*, ____ U.S. ____, 100 S.Ct. 2069, 2082 (1980).

White Mountain Apache, on closer examination, actually supports New Mexico's tax. Arizona's interest in collecting its taxes was weak. Here, as in the *Colville* case, the interest of the state is strong: New Mexico seeks to assess its gross receipts taxes against the contractors "in return for governmental functions it performs for those on whom the taxes fall." *White Mountain Apache*, 100 S.Ct. at 2587. Contrary to *White Mountain Apache*, where the taxpayer's presence in the state was limited to the confines of the reservation, the contractors here all had performed other work in New Mexico; they were present generally in the state, for they left the Reservation after every workday. *Pet.*, 8c, 9c, 15c. They were thus the recipients of state services, *Pet.*, 15b, for which the state may seek a fair return. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940). Yet another point of distinction: the taxes in *White Mountain Apache* were levied to compensate Arizona for services it never provided to the contractor. General revenues from New Mexico's gross receipts tax, however, make possible not only the benefits afforded the contractors, but also the services the state provides for tribal members living on the Mescalero Reservation. *Pet.*, 5c.

Finally, the District Court's judgment that the Secretary of the Interior acted beyond the scope and intent of the Indian trader licensing statute, 25 U.S.C. §§261-264, in granting licenses to the construction contractors, *Pet.*, 19b-20b, remains unchallenged by either the Tribe or the United States. Both

parties are bound by that decision and may not seek to avoid its effect now. *Montana v. United States*, 440 U.S. 147 (1979). Moreover, the Indian trader statutes, and consequently the holding of *Central Machinery*, do not apply here. That legislation is concerned only with the sale of "goods" or "merchandise," not with the sale of the contractors' construction services. See *Pet.*, 13b-14b.

A second reason for denying the writ is the lack of national importance of this case. Respondents agree that many questions of state jurisdiction with respect to activities on an Indian reservation are important, and that this case is important to the Tribe. However, the particular question presented here is not of great national importance. Petitioner's invocation of a supposed adverse effect of the Court of Appeals' decision on "nationwide tribal development efforts" finds no evidentiary support in the record, and as a matter of fact is simply not true. Most western states[6] do not tax the proceeds from construction, much less when the construction takes place on Indian reservations. Thus, the situation presented to the Court by this Petition has little if any import for other states or tribes.

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6. Only three other western states tax construction activity: Arizona, Ariz.Rev.Stat. §42-1310.2(i); South Dakota, S.D.C.L. 1967 §10-46A *et seq.*; and Washington, Wash.Rev.Code Ann. §§82.04.050, 82.04.250, 82.04.280.

CONCLUSION

Because the Tenth Circuit reached the correct result, and because the petition does not present an issue of national significance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. .....

In The

Supreme Court of the United States

MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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No. .....

In The
Supreme Court of the United States

MESCALERO APACHE TRIBE,

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FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND THE STATE OF NEW MEXICO,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The State of Montana has within its borders seven large areas of land set aside as Indian reservations. Lo-

cated within each reservation are tribal members and non-members.[1] Montana has consistently asserted taxation jurisdiction over non-Indians within the exterior boundaries of these reservations. In a case similar to the present one, Montana asked this Court to uphold its authority to impose nondiscriminatory state taxes on non-Indians transacting business on an Indian reservation. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U. S. 463 (1976).

In a case currently pending before the Ninth Circuit Court of Appeals, the Crow Tribe of Indians has challenged application of Montana's coal severance tax and gross proceeds from coal tax to non-Indian coal producers mining off-reservation coal in which the Tribe has a beneficial interest.[2] *Crow Tribe of Indians v. State of Montana, et al.*, 9th Cir. No. CA-79-4321. The Crow Tribe made "economic burden" arguments similar to those made by the Mescalero Apache Tribe here. The United States District Court for Montana upheld the state taxes using the legal incidence test, 469 F. Supp. 154 (D. Mont. 1979), as did the Tenth Circuit Court of Appeals in this case. The Montana District Court found that the state taxes were reported and

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1 *See*, for example, *United States v. State of Montana*, 604 F. 2d 1162, 1164 (9th Cir. 1979), *cert. granted*, April 13, 1980, describing the Crow Indian Reservation, and *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1313 (D. Mont. 1975), describing the Flathead Indian Reservation.

2 Montana Coal Severance Tax Act, §§ 15-35-101 through 15-35-110, and Montana Gross Proceeds from Coal Tax Act, §§ 15-23-701 through 15-23-704, Montana Code Annotated, 1979. The nature of these taxes is admittedly different from the New Mexico tax at issue here, but for the limited purpose of this Brief's explanation of the legal incidence test, the taxes are similar.

paid by non-Indians, and that those non-Indians had no right to claim a tribal tax exemption.

Montana has a vital interest in the Tenth Circuit's decision because it reaffirms the long-accepted legal incidence analysis which resolves numerous questions regarding the respective powers of states and tribes. Protection of that analysis and the judgment here is necessary to assure a principled and predictable approach to similar questions, and to avoid the inevitable chaos which will result if the Mescalero Apache Tribe's theory is accepted in this case.

STATEMENT OF THE CASE

This case involves the imposition of the New Mexico gross receipts tax, N. M. Stat. Ann. §§ 72-16A-3F, K, *et seq.* (1978), on non-Indian building contractors who performed construction work for the Mescalero Apache Tribe within the boundaries of both the Mescalero's reservation and the State of New Mexico. The major projects were the Inn of the Mountain Gods resort and related tourist facilities. The complex was funded almost entirely from Economic Development Administration grants, Petition for Writ of Certiorari (hereafter "Pet."), 6c, and Petitioner furnished no capital for the cost of construction. Pet., 11c. EDA guidelines permit inclusion of the cost of "passed-on" state taxes in grants. Pet., 6c. The Federal District Court and the Tenth Circuit Court of Appeals found the legal incidence test to be applicable, and, after applying the test and finding the incidence to be on the non-Indian contractors, held the challenged taxes permissible. *Mescalero Apache Tribe v. O'Cheskey,* 439 F. Supp. 1063, 1072 (D. N. M. 1977), *affirmed,* 625 F. 2d 967, 970 (10th Cir. 1980).

REASONS FOR DENYING THE WRIT

I. Application of the legal incidence test is necessary to determine which parties have a legal interest in the taxation so that the proper rules of law may be applied as between those parties.

A. The legal incidence test is the only method by which the legally interested parties may be determined.

The decision and mode of analysis of the Tenth Circuit Court of Appeals were correct. The Court considered the validity of taxes which were legally due from non-Indians, but which were challenged on the basis of a tribal tax immunity. In determining that the taxes were valid, the Court properly applied the only rational test available to it—the legal incidence test. The test was simple. The Court examined the wording of the tax statutes challenged and determined who was legally liable for the payment of the tax. The Court correctly held that the non-Indian contractor doing business with the Tribe was liable for payment of the New Mexico Gross Receipts Tax. Thus, the Court applied the legal incidence test to identify which party was legally liable for the payment of the tax, and correctly determined that that non-Indian party was not entitled to tax exemptions reserved for Indians.

The legal incidence test has been used frequently by this Court and others in determining whether or not a party is entitled to a tax immunity. *Washington v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* — U. S. — (slip opinion at p. 5, n. 9) (1980); *Moe v. Confederated Salish and Kootenai Tribes of the*

Flathead Reservation, 425 U.S. 463 (1976); *Thomas v. Gay,* 169 U.S. 264 (1898). *See also, Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253, 1257 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F. 2d 1184, 1186 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972). The application of the legal incidence test is the *first* test which must be applied to disputes such as the one involved in this case. Other tests are considered only after the legal incidence test has been applied and the parties legally interested in the taxes have been identified.

Petitioner does not contend, nor could it contend, that the legal incidence of the challenged tax falls upon the Tribe. The legal incidence of the tax is clearly upon the non-Indian contractors, as the court below found. *Mescalero Apache Tribe v. O'Cheskey, supra,* 625 F. 2d at 968-69. Because the proper application of the legal incidence test defeats any possible claim by Petitioner that the tax is invalid, Petitioner chooses to argue that the test simply does not apply. Pet., 8-9. Petitioner is pleading that this Court apply purported rules of Indian law to a dispute which is really between the State of New Mexico and non-Indian citizens of the State. Petitioner asks this Court to indulge in the very evil eschewed by the legal incidence test: the use of rules of Indian law which do not apply between the parties with a legal interest in the tax challenged.

The legal incidence test provides the only mode of analysis yielding predictable and rational results in challenges to tax statutes. Only by using that test can one correctly determine which party is liable for the payment of the tax, and which party may properly challenge the tax.

B. The use of an "Economic Burden" test to determine the legally interested parties is contrary to established law.

The legal incidence test is the only manner by which the proper parties, and thus the proper rules, may be determined. Petitioner's contention that the alleged existence of a resulting economic burden on it requires that the legal incidence test not be applied is clearly incorrect. The economic effect is not only irrelevant, *White Mountain Apache Tribe v. Bracker,* — U. S.—, 48 USLW 4897, 4901, n. 15 (1980); *Gurley v. Rhoden,* 421 U. S. 200, 204 (1975); *Polar Co. v. Andrews,* 375 U. S. 361, 382 (1964), but also undefinable. In this case, it is utterly impossible to determine who will ultimately pay all or any part of the tax. *See, Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967, 970 (10th Cir. 1980). Will it be the non-Indian contractors who pay the tax? Will the contractors pass the cost of the tax on to the Petitioner under the indemnification agreement? Will Petitioner eventually pass the cost on to the tourists patronizing the Inn of the Mountain Gods? Will the tourists pass the cost on to their employers in the form of higher wage demands to cover their vacation costs?[3] The legal incidence test allows each entity along the eco-

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3 If the costs are traced in a different direction, an initial economic burden may fall on the Economic Development Administration under its guidelines which permit grants to cover "passed-on" state taxes. Pet., 6c. *Compare, White Mountain Apache Tribe v. Bracker,* — U. S. —, 48 USLW 4897, 4901 (1980) where state taxes were not already part of the established "Federal calculus." Further, since any tribal economic burden can be so easily passed on under EDA guidelines in this case, it is clear that Petitioner faces no economic threat —the pockets of the Tribe are just as "deep" as those of the EDA.

nomic chain to claim only the immunities which it possesses. Under Petitioner's rationale, there is no reason for the Tribe to refrain from challenging imposition of state taxes on the contractor's off-reservation or out-of-state suppliers, as such assessments have an identical impact on costs to Petitioner. The Tribe could also prevent the states from taxing the employees of the contractor's nonresident suppliers, and anyone from whom those employees make a purchase, *ad infinitum*. There would be no tax, imposed by any state on anyone, which could withstand Petitioner's economic burden argument. The legal incidence test reveals the only fact which can be consistently found and applied as a line of demarcation, and which can determine what entity has sufficient interests in the taxation. *See, United States v. City of Detroit,* 355 U.S. 466, 472-473 (1958); *Alabama v. King and Boozer,* 314 U.S. 1, 8-9 (1941). While it is true that some of the cases establishing the legal incidence test as the proper mode of analysis involve the United States government rather than a tribal government, it is apparent that striking down this state tax would attribute a greater sovereignty to tribes than the United States enjoys since the United States must pay this particular tax to New Mexico. *United States v. New Mexico,* 581 F. 2d 803 (10th Cir. 1978).

C. The preemption rules applicable to Indian cases are irrelevant to this case.

Petitioner has contended that the proper mode of analysis in this case is preemption. Pet., 9. *Amicus* takes exception to Petitioner's substantive preemption arguments, but agrees that, in general, preemption is the usual mode of analysis in Indian cases.[4] *See, Mescalero Apache Tribe v. Jones,* 411 U. S. 145 (1972); *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164 (1972). However, such an analysis is incorrect here because this is not, in reality, an Indian case.

The legal incidence test was properly used by the Tenth Circuit and it revealed that there is no legally cognizant tribal interest. The substantive rules of law governing Indian cases are irrelevant and do not apply to a dispute between a state government and its non-Indian citizens.

CONCLUSION

The decision of the Court below is correct. It is based upon a theory, repeatedly utilized and reaffirmed by this Court, which provides the only means whereby disputes between states and non-Indians doing business on Indian reservations may be resolved with any degree of consistency and predictability. To hold that the legal incidence

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4 Even assuming that the preemption analysis should be used to resolve this case, Petitioner must fail. See, New Mexico's Brief of Respondents in Opposition.

test does not control this case would allow innumerable non-Indians to reap for themselves the tax exemptions belonging to tribal Indians.

The Petition for a Writ of Certiorari should be denied.

DATED this 14th day of January, 1981.

Respectfully submitted,

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MOTION FILED
NOV 26 1980

80-812

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. [redacted]

MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico and His Successors in Office; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and THE STATE OF NEW MEXICO,

Respondents.

Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae in Support of a Petition For a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

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Respondents.

Motion for Leave to File Brief of Amicus Curiae

Navajo Forest Products Industries, an enterprise of the Navajo Tribe, moves for leave to file the attached Brief of Amicus Curiae in support of the petition for certiorari. Petitioner's attorney has consented to the filing of this amicus brief. Respondent's attorney has refused because "this is war and he wants no help for the Petitioner."

Navajo Forest Products Industries' interest in this case arises from the fact that it is a party to a case raising the same issue, namely, whether the New Mexico gross receipts tax may constitutionally be imposed on the value of services performed by contractors engaged in creating improvements for an Indian tribal enterprise located on the reservation, where the tribal enterprise is developed and closely regulated by the federal government pursuant to the long-

standing congressional policy of promoting economic improvement and self-sufficiency for Indian tribes on reservations. *Navajo Forest Products Industries v. O'Cheskey,* No. 78-432 (D.N.M.). Amicus' case has been stayed by District Judge Campos pending a final decision of this appeal.

This case was heard by the Court of Appeals for the Tenth Circuit *en banc.* Its opinion upholding the tax was delivered on June 5, 1980. On June 27, 1980, this Court decided *White Mountain Apache Tribe v. Bracker,* .... U.S. ...., 100 S.Ct. 2578 and *Central Machinery Co. v. Arizona State Tax Comm'n,* .... U.S. ...., 100 S.Ct. 2592, striking down, as federally preempted, similar Arizona fuel excise and gross receipts taxes imposed on contractors dealing with Indian tribal entities. These cases were called to the Court of Appeals' attention, and a rehearing was granted. However, in the briefest of opinions, the Court of Appeals adhered to its prior decision, wholly disregarding both the holdings and the reasoning of this Court's decisions at the end of the last term.

In its petition for certiorari, the Mescalero Apache Tribe has concentrated on the federal assistance to its project and on the fact that the court below failed properly to consider the standards of preemption announced by this Court.

Amicus desires to make the following additional arguments: First, contrary to its assertions on rehearing, the Court of Appeals applied a test of taxability long superseded by this Court's decisions. Second, the Court of Appeals failed to consider the tests this Court has adopted for determining claims of preemption of state taxes on Indian tribal-connected activities. Third, the decision below will control questions of state taxation for Indian tribes and tribal-related contractors throughout the Rocky Mountain states where many tribes are located. Those tribes, like tribes in other circuits, have a right to the equal application

of this Court's decisions. For that reason as well as to uphold the rule that this Court's opinions are controlling on all lower courts, the decision below may not stand. Fourth, the issues are so clear and the outcome of the case so completely controlled by this Court's latest decisions that summary reversal is appropriate. This Court's time need not be further taken to redecide an issue already resolved by its recent decisions.

For all of these reasons, Amicus Curiae respectfully requests that the motion for leave to file its brief in support of petition for certiorari be granted, that certiorari be granted in this case, and the decision below be summarily reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

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FRED L. O'CHESKEY, as Commissioner of Revenue of and for the State of New Mexico and His Successors in Office; THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; and THE STATE OF NEW MEXICO,

Respondents.

Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to The Tenth Circuit Court of Appeals

Amicus Curiae, Navajo Forest Products Industries ("NFPI"), respectfully submits this brief in support of the Mescalero Apache Tribe's petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

I.
SUMMARY OF ARGUMENT

In its *en banc* decision below, the Court of Appeals held that New Mexico can levy its gross receipts tax on non-Indian contractors for their work on the Mescalero Reservation under contsruction contracts with the Mescalero Apache Tribe or one of its agencies. The Court of Appeals enforced the state tax even though the construction was for a federally approved, sponsored and regulated economic development project of the Mescalero Apache Tribe,

even though the contractors were licensed Indian traders, and even though the economic burden of the tax fell on the tribe.

The lower court upheld the tax solely because its legal incidence was on the non-Indian contractors. Although this Court's recent rulings in *White Mountain Apache Tribe v. Bracker,* ..... U.S. ....., 100 S.Ct. 2578 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* ..... U.S. ....., 100 S.Ct. 2592 (1980) were called to the Tenth Circuit's attention, it ignored their teachings. It did not give any meaningful consideration to the twin barriers of federal preemption and non-interference with tribal self-government, nor did it make "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2584.

The Court of Appeals "has decided a federal question in a way in conflict with applicable decisions of this Court," justifying a grant of certiorari. Sup. Ct. R. 17.1(c). Indeed, the demonstrable conflict between the reasoning and result below and this Court's most recent Indian taxation decisions "is, of course, one of the strongest possible grounds for securing the issuance of a writ of certiorari." R. Stern & E. Gressman, *Supreme Court Practice,* 273 (5th ed. 1978). The error is so clear as to warrant summary reversal.

II.

INTEREST OF AMICUS CURIAE

Amicus NFPI is a wholly-owned and controlled entity of the Navajo Tribe, which, like the Fort Apache Timber Company in last term's *White Mountain Apache Tribe* case, was formed under the aegis of the United States Bureau of Indian Affairs to manage, harvest, process and sell on a sustained-yield basis the timber grown on the Navajo Reservation. NFPI was organized to meet the goals of the

Navajo-Hopi Rehabilitation Act of 1950 (25 U.S.C. §631 *et seq.*), to "encourage and further the social, economic and educational level of the Navajos" and "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities." 28 U.S.C. §631; NFPI Summary Plan of Operation, art. I; *see Secretary of Labor v. Navajo Forest Products Industries,* OSHRC Docket No. 76-5013 (Sept. 30, 1980).

Since its inception in 1959, NFPI has created over 600 industrial jobs for Navajos, developed a sustained-yield harvesting program for the Navajo Reservation's large timber stands, built many miles of roads giving Navajos living in remote areas access for the first time to schools, medical facilities and trading posts, generated $97.6 million of lumber sales for the tribe, created a sawmill town and market center on the reservation, and improved the lot of the Navajos in many other ways. *See Secretary of Labor v. Navajo Forest Products Industries, supra,* slip op., 5-6.

In order to expand its manufacturing capacity, NFPI determined in 1971 to build a modern particleboard plant at Navajo, New Mexico, wholly within the Navajo Reservation. Lacking the necessary skills itself, NFPI engaged non-Indian architects, engineers and contractors to enter the reservation and design and build the particleboard plant. The plant was completed in 1976 at a total cost of $10-11 million. Since its completion the plant has manufactured particleboard for NFPI. Every step in the development of the particleboard plant, from initial concept to ultimate completion, was approved, supervised and funded by the United States Economic Development Administration in fulfillment of the long-standing federal policy of promoting the economic self-sufficiency of the Indians.

Like the Mescalero Apache Tribe and like the tribal entities in *White Mountain Apache Tribe* and *Central Machinery Co.*, NFPI was required to hold its non-Indian contractors harmless from the gross receipts tax New Mexico has assessed against those contractors. The economic burden of the tax therefore falls fully on NFPI and the Navajo Tribe. NFPI has commenced an action seeking a declaration that New Mexico cannot impose its gross receipts tax on the contractors who built NFPI's particleboard plant. *Navajo Forest Products Industries v. O'Cheskey,* No. 78-432 P (D.N.M.). NFPI's action has been stayed pending final resolution of the Mescalero Apache Tribe's case.

Except for the fact that NFPI's contractors supplied specialized skills and services not readily available elsewhere and had no contacts with New Mexico other than building NFPI's plant, the facts in NFPI's case closely parallel the facts in this case. The outcome here will likely control the result in NFPI's suit.

III.

ARGUMENT

A. The Need for Conformity to this Court's Decisions

It is essential to the function of the federal judicial system that this Court's decisions be the final authority on all matters to which this Court has spoken. Therefore, this Court has announced that where there is a direct conflict between the decision of a court of appeals and decisions of this Court, grounds for certiorari exist, and certiorari is commonly granted. *See Henderson v. Kibbe,* 431 U.S. 145, 152 (1977), where certiorari was granted "[b]ecause the Court of Appeals decision appeared to conflict with this Court's holding in *Cupp v. Naughton,* 414 U.S. 141." Such a case calls for summary reversal, *Helvering v. Wiese,* 292 U.S. 614 (1934), and may be disposed of without argument or written opinion. *S.E.C. v. Otis & Co.,* 338 U.S. 843

(1949); *F.C.C. v. Broadcasting Service Organization, Inc.*, 337 U.S. 901 (1949).

That is the situation here. Summary reversal is appropriate.

B. The Court of Appeals' Opinion Directly Conflicts with This Court's Decisions in White Mountain Apache Tribe and Central Machinery Co.

1. THE COURT OF APPEALS RELIED SOLELY ON THE TAX'S LEGAL INCIDENCE, IGNORING FEDERAL PREEMPTION AND TRIBAL SELF-GOVERNMENT.

The Court of Appeals' decision is premised on the notion that "the initial incidence of the [New Mexico gross receipts] tax must be the determinative factor. It is the only significant matter for our consideration." Pet., 6a-7a. According to the Court of Appeals, to resolve this case, it only needed to determine whether the legal incidence of New Mexico's tax was on the non-Indian contractors or on the Indian tribe with which they contracted. Pet., 4a-5a, 6a-7a, 8a, 10a-11a.

The Court of Appeals easily answered that narrow question. In *United States v. State of New Mexico,* 581 F.2d 803 (10th Cir. 1978), the same court had determined that the legal incidence of the same tax was on nongovernmental contractors, not the federal government for which they worked. Consequently, the court had there concluded that federal law did not preempt imposition of the tax on contractors working for the federal government. According to the Court of Appeals, that holding foreclosed the only relevant question in this case:

> The incidence of this tax cannot be different here just because Indians are involved. The tax is the same, and it is clearly on the contractor. The Indians here are in no different position than was the federal government in *United States v. State of N.M.,* 581 F.2d 803 (10th Cir.) Pet., 5a.

The tribe's agreements to indemnify its contractors for the gross receipts tax did not change the picture in the Tenth Circuit's view. Those agreements had been entered into, said the Court of Appeals, at the tribe's own election to make "it *appear* that the incidence of the tax was on the Tribe when it was not." Pet., 6a; emphasis in original.[1] Though recognizing that "there is at least an initial economic impact on the Tribe since the contractor can pass the tax along," the Court of Appeals refused to venture into the "morass of indirect burdens," holding them to be "of no consequence." Pet., 8a. Moreover, the lower court found that the uncontroverted, indirect burden of the tax did not interfere with the tribe's internal affairs because the tax was non-discriminatory[2] and because it only affected the tribe's money. Pet., 10a-11a.

Having quoted this Court's holding that "state laws may be applied [on the reservation] unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law," *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973), the Court of Appeals summarily dismissed the tribe's federal preemption claim:

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1. Identical agreements to reimburse the contractor or seller for state taxes were involved in both *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2582 and *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2594, n. 2. In neither case did this Court disregard the real economic burden those taxes imposed on the tribes because the tribes voluntarily made those agreements.

2. The Tenth Circuit's reliance on the nondiscriminatory nature of the gross receipts tax is misplaced. All the state taxes this Court has reviewed in recent years, including those at issue in *White Mountain Apache Tribe* and *Central Machinery Co.,* were nondiscriminatory. The nondiscriminatory nature of the taxes in those cases did not save them from federal preemption; indeed, the point has not been treated as a significant consideration in any of this Court's recent decisions.

> This clearly states again the position of, or application of state laws on the Mescalero Reservation. This leaves no room for any doctrine of preemption. The relationship of the parties is defined. The parties are defined, and are only the state and Congress. Pet., 8a.

The Court of Appeals also found it unnecessary to examine the state's interest in enforcing its tax law. According to the lower court, it was enough that the contractors and the tribe presumably derived some unspecified benefit from New Mexico's laws and governmental activities. Pet., 6a. Nor, in the lower court's view, was the "fact that some of the services, and most of them, were performed on Indian land . . . a factor to be considered . . . ." Pet., 8a.

Finally, the Court of Appeals dismissed *Warren Trading Post v. Tax Comm'n,* 380 U.S. 685 (1965) because there the taxed trader was an entity long licensed and regulated as an Indian trader, a permanent enterprise on the reservation. Pet., 9a. By contrast, the Court of Appeals found that the "licensing in the case before us was, of course, a pretext or a fiction and in no way was comparable to the licensing in *Warren. See* the trial court finding of fact as to the licensing." *Ibid.*[3]

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3. The trial court did not find that the Indian trader licenses were a pretext or fiction. Instead, it held that the licenses had been improperly issued because the Indian trader statutes were not intended to cover commercial transactions "conducted by experienced, knowledgeable people on a highly sophisticated level," but only transactions "where the Indian could be at the mercy of the white man in the absence of federal protection." *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063, 1068 (D.N.M. 1977). In *Central Machinery Co.,* this Court noted no such "helpless Indian" limitation of the Indian trader statutes. To the contrary it found those statutes applied to a clearly commercial sale of 11 tractors to an Indian tribal enterprise, which was not shown to lack expertise or bargaining power.

2. THIS COURT HAS REJECTED THE LEGAL INCIDENCE TEST AND REQUIRED A PARTICULARIZED INQUIRY INTO STATE, FEDERAL, AND TRIBAL INTERESTS WHICH THE COURT OF APPEALS DID NOT PERFORM.

At each step of the way, the Court of Appeals' opinion conflicts with the reasoning, principles and tests this Court most recently expounded in *White Mountain Apache Tribe v. Bracker,* ..... U.S. ....., 100 S.Ct. 2578 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* .... U.S. ...., 100 S.Ct. 2592 (1980).

First, in Indian tax cases, this Court has discarded the legal incidence test which the Tenth Circuit found crucial. In both *White Mountain Apache Tribe* and *Central Machinery Co.,* the legal incidence of the tax was on the non-Indian contractor or seller. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2581-2582 & n. 5; *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2595 n. 3. Yet, no opinion in either case suggested that that fact was significant, let alone crucial, in assessing the taxes' validity. To the contrary, the demise of the legal incidence test merited only a footnote:

> Nor may appellee distinguish the present case from *Warren Trading Post, supra,* by contending that the tax at issue in this case falls upon the seller of goods and not the buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. . . . [R]egardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians . . . ." *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* 100 S.Ct. at 2595, n. 3.

Second, this Court specifically warned against the simple-minded application of federal-state preemption principles to Indian law questions:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2583.

The Tenth Circuit's unthinking reliance on its own decision in *United States v. State of New Mexico, supra,* directly contravenes this warning.

Third, this Court reaffirmed the controlling significance of the two distinct but interrelated tests of federal pre-emption and noninfringement of tribal self-government. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2583. As this Court said:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. [Citation.] As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. [Citation.] Fn. omitted; *id.* at 2583-2584.

Where a state attempts to tax non-Indians' activities on the reservation, the vindication of these policies has required "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 2584.

The Tenth Circuit failed to make that particularized inquiry in this case. Though recognizing that the New Mexico tax posed an indirect burden on the Mescalero Apache Tribe and its federally sponsored and regulated economic development project, the Court of Appeals found that burden legally irrelevant because it was indirect and involved only the loss of money.[4] Pet., 8a, 10a-11a. The Tenth Circuit did not even mention the federal interests in tribal self-government and economic development at stake here. Nor did the lower court examine New Mexico's interest beyond asserting that both the contractors and the Mescaleros derived some unspecified benefits from the state. Pet., 6a.

In contrast to the majority opinion below, Circuit Judge McKay's dissent made the particularized inquiry enjoined by this Court, arriving at the unassailable conclusion that New Mexico's tax is preempted.

Fourth, the Court of Appeals erroneously held that the fact that the contractors' services were performed on the Mescalero Reservation was "not a factor to be considered." Pet., 8a. Yet, according to this Court:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded permissible limits. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. 2587.

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4. In *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2586-2587, this Court held the monetary burden of similar state taxation inconsistent with the federal policy of encouraging tribes to revitalize their self-government and assume control of their economic and business affairs.

Finally, this Court's decision in *Central Machinery Co., supra,* destroys the basis on which the Tenth Circuit tried to distinguish *Warren Trading Post, supra.* In *Central Machinery Co.,* this Court held that the Indian trader statutes and regulations preempted state taxation of a seller who was neither licensed as an Indian trader nor located on the reservation. *A fortiori, Warren Trading Post's* rationale should apply to the contractors in this case who sold and performed their services on the reservation and who were licensed as Indian traders. *See* n. 3, *supra.*

In short, from beginning to end the Tenth Circuit's reasoning conflicts with the principles this Court reaffirmed last term. Not surprisingly, the Court of Appeals' conclusion is likewise at odds with the holdings in *White Mountain Apache Tribe, supra,* and *Central Machinery Co., supra,* as amply demonstrated in Judge McKay's dissent below and in the petition for certiorari.

3. ON REHEARING, THE COURT OF APPEALS BRUSHED ASIDE THIS COURT'S RECENT DECISIONS WITHOUT ANALYSIS.

Though given an opportunity on rehearing to correct these errors in light of this Court's recent rulings, the Court of Appeals summarily dismissed *White Mountain Apache Tribe, supra,* and *Central Machinery Co., supra,* as adding nothing to the law and requiring no change in the Court of Appeals' prior opinion.

According to the Court of Appeals, this case is not a "sale of 'things' case" and is therefore not controlled by the Indian trader statutes or *Warren Trading Post.* For that reason, the Court of Appeals concluded that "*Central Machinery* adds no new elements or factors not already considered." Pet., 49a.

In fact, as already shown, *Central Machinery Co.* destroys the sole ground on which the Tenth Circuit distin-

guished *Warren Trading Post* in its main opinion. *See* p. 11, *supra*. The sale-of-things distinction which the Court of Appeals found for the first time on rehearing is equally erroneous. The Indian trader statutes regulate trade and traders with the Indians. 25 U.S.C. §§261-264. Though those statutes mention sale of goods, they do not limit the regulation of traders to those who sell tangible assets—things—as opposed to services. To the contrary, the Bureau of Indian Affairs, charged with enforcement of the Indian trader laws, has determined that the contractors in this case fall within the regulatory reach of those statutes and issued them licenses accordingly. *See Mescalero Apache Tribe v. O'Cheskey, supra,* 439 F.Supp. at 1068.

The Court of Appeals handled *White Mountain Apache Tribe* even less convincingly. At the end of a string of quotations from that decision, the lower court cited this Court's statement that the state taxes were not preempted solely because they imposed an economic burden on the tribe, but because the comprehensive federal regulatory scheme left no room for additional state law burdens. *White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2587-2588, n. 15. "Under [this] footnote," said the Court of Appeals, "the burden argument is the same as preemption." Pet., 50a-51a. That sentence was all the lower court said about why *White Mountain Apache Tribe* does not require a different result here.

Neither on rehearing nor in its main opinion did the Court of Appeals examine the federal regulatory scheme under which the Mescalero Apache Tribe developed the projects for which New Mexico assessed taxes. It did not consider what impact imposition of the taxes would have on the federal regulatory purpose. It did not weigh the state's interest in imposing the tax. In short, the Tenth Circuit utterly ignored the teaching of *White Mountain*

Apache Tribe, failing to make the particularized inquiry that decision requires and relying instead on a discredited and oversimplified notion of the legal incidence of New Mexico's tax.

C. For Reasons of Public Policy, This Court Should Grant Certiorari and Summarily Reverse

NFPI and many other Indian tribal enterprises and tribes are located within the Tenth Circuit. They are entitled to have their legal claims determined on a uniform basis consistent with this Court's rulings.

The decision below will deny them that right. It is utterly inconsistent with the law as pronounced by this Court last term.

The Mescalero Apache Tribe has demonstrated in considerable detail the important federal policies and programs involved in its development of the Inn of the Mountain Gods complex. It has also shown that those policies and programs will be frustrated by imposition of New Mexico's tax. The same is true of NFPI's particleboard plant project. Many hundreds of other Indian business transactions, fostered by Congress to promote Indian economic development and self-government, have occurred or will occur within the Tenth Circuit. Unless certiorari is granted, they will all be controlled by the lower court's decision, which as shown is at odds with this Court's decisions.

In all material respects, this case is the same as *White Mountain Apache Tribe* and *Central Machinery Co.* While it is unfortunate that each term this Court must decide more Indian tribal claims of preemption from state taxes, fairness and justice, as well as the uniform administration of the laws, require that certiorari be granted here. However, since there can be no dispute about the issues or outcome, both of which are controlled by last term's decisions, we respectfully suggest that a plenary hearing is not required.

Certiorari should be granted, and the Court of Appeals' decision should be summarily reversed. See cases cited at pp. 4-5, *supra*.

IV.

CONCLUSION

For the above-stated reasons, this Court should issue its writ of certiorari to the Court of Appeals and summarily reverse the judgment below.

Respectfully submitted,

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No. 80-812

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE MESCALERO APACHE TRIBE, PETITIONER

v.

FRED L. O'CHESKEY, COMMISSIONER OF REVENUE, STATE OF NEW MEXICO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case presents the question whether the State of New Mexico may tax the gross receipts of non-Indian contractors performing construction services for the Mescalero Apache Tribe within the boundaries of the Tribe's reservation. For the reasons set forth below, the United States, which is concerned both because of its special relationship with American Indians and because of its interest in effectuating congressional policies of encouraging tribal economic self-sufficiency, urges that the petition for certiorari be granted.

1.a. The Mescalero Apache Tribe is a federally recognized Indian tribe that occupies a reservation in southern New Mexico (Pet. App. 3c-4c). In the 1960's, the Tribe commenced planning of a resort complex, consisting of a

hotel and associated recreational facilities, to be constructed on the Tribe's reservation.[1] The resort, known as the Inn of the Mountain Gods, was intended as a means of generating income to assist in the Tribe's economic development and, in particular, to replace anticipated declining revenues from tribal timber enterprises (*id.* at 6c).

Primary funding for the complex was obtained from the Economic Development Administration (EDA), an agency of the United States Department of Commerce (Pet. App. 6c). Additional funding has been obtained through a bank loan, 90% of which is guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* The other 10% is guaranteed by the Tribe through the assignment to the bank of certificates of deposit (Pet. App. 12b).

When the Tribe first sought bids on the project, only one contractor submitted a bid and that bid exceeded available funding. To reduce costs, the Tribe divided the project into sub-projects and deleted some previously planned features. Some bidders had apparently included the cost of the New Mexico gross receipts tax, which was then calculated as 4% of a contractor's gross receipts (Pet. 4).[2] (The budget submitted to EDA had not included such a tax.) The Tribe asked the bidders to submit alternate bids that did not include the tax. The total of the accepted bids calculated without the tax amounted to a sum within available funding

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[1]The question of the State's attempt to regulate liquor sales at the resort complex was litigated in *United States* v. *New Mexico*, 590 F. 2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979), holding that the State lacked such authority. The Tribe has also developed the Sierra Blanca ski resort located outside the reservation boundaries. That enterprise was considered by this Court in *Mescalero Apache Tribe* v. *Jones*,

[2]This tax, now codified at N.M. Stat. Ann. § 7-9-1 *et seq.* (Supp. 1980), has since been reduced to 3 3/4% of gross receipts.

(Pet. App. 7c). The selection of contractors and the terms of each contract depended on EDA approval (*ibid.*). Bureau of Indian Affairs officers participated in all the negotiations involving the project and also approved the ultimate contracts (Pet. App. 6b). Contractors selected included both New Mexico companies and out-of-state firms; all were non-Indian firms (*id.* at 1b, 2c).

Before construction work began, a representative of the New Mexico Construction Industries Commission, the agency responsible for inspecting construction work in the State, requested that the contractors obtain New Mexico building permits and that he be allowed to inspect their work. These requests were refused by the Tribe's president, and the Construction Industries Commission made no further attempt to assert jurisdiction over the project (*id.* at 9c). Inspection and supervision of the construction activities was performed only by the Tribe's agents and by federal authorities (*ibid.*). The BIA, represented on the reservation by its Mescalero Agency, issued Indian trader licenses to the contractors, under the Indian trader statutes, 25 U.S.C. 261 *et seq.* (Pet. App. 5c, 8c).

b. Late in 1974 and in February 1975, the New Mexico Bureau of Revenue filed gross receipts assessments against all the resort complex contractors (Pet. App. 1c). The contractors filed protests against each of the assessments. In 1976, after the Tribe's attempts to intervene in the administrative assessment proceedings had been finally rejected by state courts (*id.* at 14b n.29), the Tribe filed this action in the United States Court for the District of New Mexico seeking a declaration that the State's attempt to levy its gross receipts tax on the contractors with respect to their work for the Tribe performed entirely on the Tribe's reservation was, *inter alia*, an impermissible interference with tribal self-government and was also barred by virtue of federal

preemption (*id.* at 1b, 3b-4b).[3] The district court ruled against the Tribe with respect to these arguments (Pet. App. 14b-17b).[4]

c. On appeal, the court of appeals, sitting en banc, affirmed the district court (Pet. App. 1a-17a), Judges Doyle and McKay dissenting (Pet. App. 17a-48a). The court held that the actual impact of the tax on the Tribe was irrelevant and that "the initial incidence of the tax," which was on the non-Indian contractors, was "the only significant matter for our consideration" (*id.* at 6a-7a). It also stated that the situs of the services on the reservation was "not a factor to be considered" (*id.* at 8a). The court cited this Court's opinion in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), as authority for the proposition that, where the application of state laws on the Mescalero Reservation is concerned, there is "no room for any doctrine of preemption" (Pet. App. 8a), although it thereafter expressly considered and

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[3]Among the grounds for preemption, the Tribe relied on the Indian trader licenses issued by the BIA to the contractors. The district court invalidated the licenses on the grounds that the transactions in this case were engaged in by "experienced, knowledgeable people on a highly sophisticated level" and that the Indian trader statutes were not designed to cover such situations (Pet. App. 6b). This ruling was not appealed to the Tenth Circuit. We note, nevertheless, that the district court's rationale is not supported in the case law. See *Central Machinery Co.* v. *Arizona Tax Comm'n*, No. 78-1604 (June 27, 1980) slip op. 5. The Department of the Interior, however, is in the process of revising its Indian trader regulations in such a way as to preclude issuance of Indian trader licenses to contractors similarly situated to those in this case. Therefore, the issue of federal preemption based on the Indian trader statutes will not be pressed here.

[4]As to a contractor on a related tribal housing project involved in the case, the district court held (Pet. App. 11b) that New Mexico law precluded assessment of that part of the gross receipts tax attributable to purchases of materials, because, under the terms of the contract, the contractor had acted as the Tribe's agent in purchasing the materials. The contractor was held liable for the tax on its receipts attributable to construction services (*ibid.*).

rejected preemption claims based on a treaty and on the Indian trader licenses (*id.* at 9a-10a).

d. On June 27, 1980, several weeks after the court of appeals issued its en banc opinion, this Court decided *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177, and *Central Machinery Co.* v. *Arizona State Tax Comm'n*, No. 78-1604, two cases involving state power to tax non-Indians doing business on Indian reservations. The Tribe thereupon petitioned the court of appeals for rehearing, urging that its decision was inconsistent with *White Mountain Apache Tribe* and *Central Machinery*. The court of appeals, in a short opinion (Pet. App 48a-51a), denied rehearing. It found *Central Machinery* inapposite (*id.* at 48a-49a), and it sought to distinguish *White Mountain Apache Tribe* on several factual grounds (*id.* at 49a-50a). It concluded that "it appears that the elements in both cited cases were considered and evaluated [in the original opinion]" (*id.* at 51a).

2. In our view, the court of appeals' decision in this case is inconsistent with *White Mountain Apache Tribe* v. *Bracker*, *supra*. In *White Mountain Apache Tribe*, this Court stated (slip op. 8) that a determination whether a state may impose a tax on non-Indians providing services to Indian tribes on reservations requires "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." The court of appeals was correct in noting that the facts of this case in some respects different from the circumstances in *White Mountain Apache Tribe*—the taxes are not identical (although the motor carrier license tax there, like the tax there, was a gross receipts tax), and the federal involvement in the reservation construction activities takes a different form from the federal involvement in the tribal timber enterprise in *White Mountain*

Apache Tribe. Nonetheless, the same analysis is appropriate, and the court of appeals—by finding the legal incidence of the tax a determinative factor, ignoring the significance of the reservation locus of the construction activities, and rejecting with little discussion the applicability of the preemption doctrine in this case—failed to make the appropriate inquiry. It has, for example, failed properly to consider the degree to which the federal government, through its policies for tribal economic development and the supervision by both the EDA and the BIA of on-reservation activities, has developed a scheme which leaves no room for this exercise of the State's taxing power.

The question of the States' power to impose such taxes is likely to be a recurring one in the Tenth Circuit, in which many tribal reservations are located. Since 1974, the EDA has administered, pursuant to congressional mandate, a special program for tribal economic development projects (42 U.S.C. 3172; 13 C.F.R. 317.61) with special eligibility and funding requirements (42 U.S.C. 3131(c), 3161(a); 13 C.F.R. 306.16). The en banc decision in this case, if not vacated, will foreclose appropriate review of taxes imposed by states in that judicial circuit on non-Indian participants in such projects.

Accordingly, the petition for a writ of certiorari should be granted. In our view, the undisputed facts are sufficient to justify final disposition of the case by this Court. On the

other hand, because the factual record was completed well before this Court's opinion in *White Mountain Apache Tribe,* it may be appropriate to direct that the case be remanded to the district court for further development of the context in which the resort project was planned and carried out.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

DOJ-1981-01